NEXT ANNUAL MEETING WILL BE HELD AT MEMPHIS, TENN., OCT. 23-25

AMERICAN BAR ASSOCIATION JOVRNAL

JULY, 1929

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CURRENT LEGISLATION—CURRENT LEGAL LITERATURE—STATE BAR NEWS

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JOVRNAL

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CVRRENT EVENTS

President Hoover's Commission Begins Work

PRESIDENT HOOVER'S commission at its first meeting adopted "The National Commission on Law Observance and Enforcement" as its official name. It thus put a stop to the rapid growth of unofficial and confusing designations. The title serves the further purpose of suggesting the wide scope of the undertaking which the President has assigned to this new body. It makes it plain that the commission will not, as many at first hastily assumed, confine itself to a consideration of the various workings of the Volstead Act and the Eighteenth Amendment. Furthermore the fact that "Law Observance" occurs in the title and even actually precedes "Law Enforcement" suggests that the public's attitude toward and responsibility for present conditions will be given particular attention.

The Commission begins its career with all the prestige which Presidential interest, an able and generally acceptable personnel, and the great importance of its task can confer. At the first meeting in the closing days of May, President Hoover addressed the Commission and restated in general terms the nature of the problem with which it is to deal. "The American people," he said, "are deeply concerned over the alarming disobedience of law, the abuses in law enforcement and the growth of organized crime, which has spread in every field of evil-doing and in every part of our country." And he concluded thus: "It is my hope that the commission shall secure an accurate determination of fact and cause, following them with constructive, courageous conclusions which will bring public understanding and command public support of its solutions. The general public approval of the necessity for the creation of this commission and the extraordinary universality of approval of its membership are in themselves evidences of the responsibility that lies upon you and of the great public concern in your task and of the hopes that you may succeed. . . I do pray for the success of your endeavors, for by such success you will have performed one of the greatest services to our generation."

Chairman Wickersham's reply gave the Commission's attitude toward its problems. "We approach our task," he said, "with a profound realization of its importance and with minds open to consider on their merits all intelligent suggestions from unprejudiced sources. We are under no illusions as to the difficulty of our task. We know there is no short cut to the millennium. But we have confidence in the fundamental honesty and right-mindedness of the American people, and their readiness to support sound methods of reform when the existence of evils is exposed, and practical methods for their eradication submitted to popular judgment. . . To the discharge of the undertaking you have devolved upon us, we pledge our best endeavors, invoking divine guidance in the performance of our task." President Wickersham also pointed out the assistance which the Commission expected to receive from an analysis and classification of the vast material in state and national records bearing on the questions before it, and also from the results of the recent studies of various organizations.

The Commission at its first Washington meeting elected Mr. Max Lowenthal of New York as secretary and secured the services of Mr. Leonard V. Harrison, who has made crime surveys in a number of cities, as statistician. It also considered the division of the work among the members, and decided to hold public hearings, after various

preliminary investigations, later in the year in Chicago, Washington, New York, San Francisco, New Orleans and other large cities. The personnel of the Commission appointed is as follows: George W. Wickersham, Chairman, former Attorney-General of the United States; Newton D. Baker, former Secretary of War; Frank J. Loesch, Chicago lawyer, who has recently rendered distinguished public service in behalf of law enforcement; Roscoe Pound, Dean of Harvard Law School; William I. Grubb, Federal Judge for the Northern District of Alabama; Monte M. Lemann, New Orleans lawyer who has been active in movements for law improvement; William S. Kenyon, Judge of the U. S. Circuit Court of Appeals; Kenneth R. Mackintosh, who has held the highest judicial posts in the State of Washington; Paul J. McCormick, Federal Judge for the Southern District of California; Henry W. Anderson, practicing lawyer of Richmond, Va., who has been special assistant to the Attorney-General and a member of the Mexican Claims Commission; and Ada L. Comstock, distinguished woman educator and President of Radcliffe College.

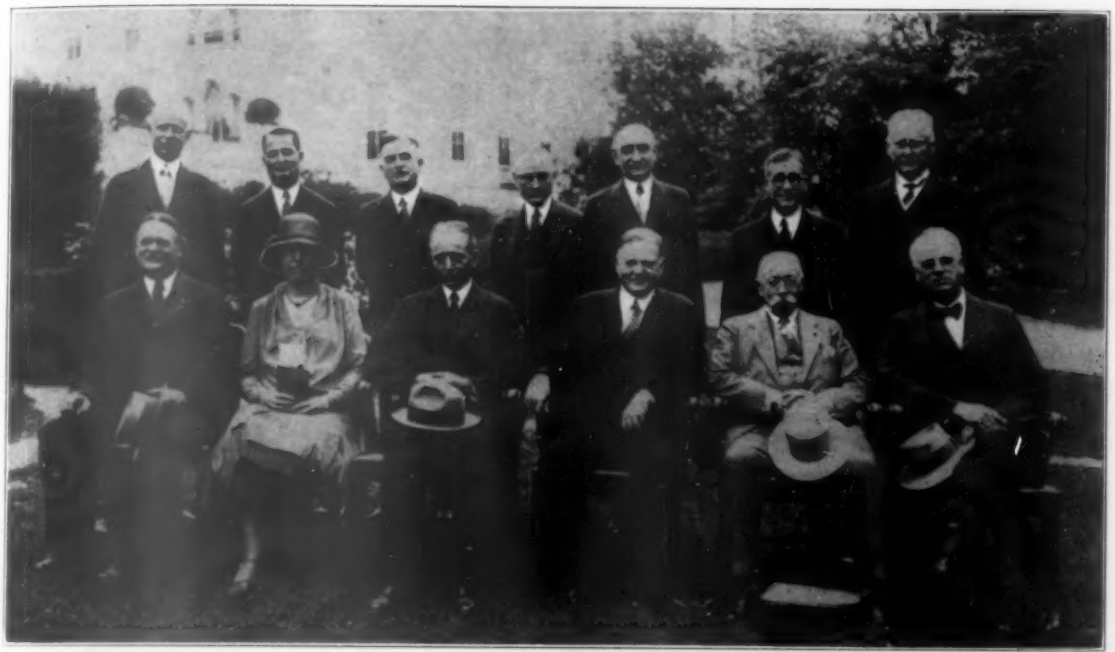
Kentucky Judicial Council Holds Meetings

THE Kentucky Judicial Council, created by an act passed by the General Assembly of Kentucky last year, has already held two meetings, and a number of committee meetings, and is preparing to submit its first report next January. This report will submit to the General Assembly the Council's recommendations on subjects pertaining mostly to procedural law, and will probably also include a set of judicial statistics.

The act creating the Kentucky Council resembles the North Carolina and North Dakota acts in that it includes in the council all the judges of the highest court, and all the judges of the general trial court. This makes the Kentucky Judicial Council probably the largest of the twelve or more councils which have been organized, since it is composed of the seven judges of the Court of Appeals, and the forty-four circuit judges of the state, a total of fifty-one members. The proper functioning of this large body is provided for in the act, however, by making attendance at the meetings mandatory, and providing payment therefor.

The Chief Justice of the Court of Appeals, at present the Hon. David A. McCandless, is ex officio chairman of the Judicial Council, and he is empowered to employ such clerical and other assistants as he deems necessary. This is expected to avoid the unfortunate fate of the judicial councils of some other states, where lack of competent clerical work between meetings resulted in little being done when the meetings convened. Chief Justice McCandless proposes to have the Council work with the Kentucky Bar Association and its committees so far as possible.

The act requires that meetings be held at least once each year, but provides that meetings may be called at any time by the Chief Justice. The by-laws adopted at the first meeting of the Council, held on Dec. 27, 1928, require regular meetings twice a year, at stated times. As before stated, two meetings have already been held. The first was



P. & A. Photo

Members of President Hoover's Recently Appointed Committee on Law Observance and Law Enforcement. Front Row, seated, reading from left to right: Roscoe Pound, Miss Ada L. Comstock, Attorney General W. D. Mitchell, President Hoover, Chairman George W. Wickersham and Judge William L. Kenyon. Back Row, left to right: Kenneth R. Mackintosh, Monte M. Lemann, Judge Paul J. McCormick, Judge William I. Grubb, Frank J. Loesch, Newton D. Baker and Henry W. Anderson.

devoted largely to organization; by-laws were adopted and a dozen committees appointed. Between that meeting and the second, which convened on March 28 of this year, these committees met from time to time and prepared reports. It was determined at this last meeting to recommit all reports so that they may be finally considered in the form of bills for recommendation to the General Assembly.

The constitutionality of the act creating the Kentucky Judicial Council had been raised at the time of its passage, and was finally determined and the act upheld in its entirety in a decision which seems to have been the first to pass upon the constitutionality of a judicial council, Coleman, Auditor v. Hurst, 226 Ky. 501, 11 S. W. (2d) 133 (1928).

Authors to Give Public Accurate Legal News

THE American Association of Legal Authors, recently organized in New York to enlighten laymen about legal matters, and to bring about closer cooperation between the legal profession and the press, and greater accuracy in newspaper accounts of trials and legal controversies, is making an active campaign to extend its influence throughout the entire nation. The association has acquired the American Law Review, the oldest law magazine in the country, and will publish it under the new title of "The United States Law Review." The association has also been furnishing as a regular feature of the Sunday edition of the New York Times a department entitled "Legal Comment on Current Events," a feature which is said to be the first practical effort of this character towards cooperation between the professions of journalism and the law, and which the association hopes to extend to other newspapers throughout the country.

The special purposes of the association are set forth as follows:

"(1) To interpret the law and the legal profession to the people of the United States.

"(2) To bring about a better understanding and relations of closer cooperation between the professions of Journalism and the Law.

"(3) To aid in the dissemination through the newspaper and periodical press of accurate information concerning the laws most nearly affecting the daily life of the citizen, of law reforms and of new laws.

"(4) To discourage and oppose in the newspaper and periodical press, sensational, exaggerated, misleading or inaccurate accounts of trials, crimes, court proceedings, or items subjecting the law, the judiciary or the legal profession, or the principles upon which our Constitution and laws are founded, to ridicule, contempt or reproach.

"(5) To promote respect for the Constitution and laws of the United States and of the several states of the Union, by inducing on the part of the public generally a clearer understanding of the purposes, reason and philosophy of their provisions.

"(6) To encourage the study of the law as part of the general educational and cultural equipment of the citizen.

"(7) To supply, so far as may be practicable, to the newspaper and periodical press, without profit to the Association, reliable discussions of legal points and controversies, of new laws and law reforms, to the end that such topics may be made understandable, entertaining and enlightening to the layman.

"(8) To encourage, in the preparation of briefs and in legal arguments, thoroughness of research and accuracy of statement, together with directness and fluency of expression and the avoidance of irrelevancies, repetitions and prolixities.

"(9) To encourage the profession of legal authorship, to aid in adequate recognition of its dignity and the receipt of reasonable rewards for its work."

The officers of this newly organized body were printed in this department in the June issue.

California Judicial Council's Second Report

THE effectiveness of a capable and active judicial council in bringing about an efficient and economical administration of the courts is evidenced in the Second Report of the Judicial Council of California, recently issued.

The influence which the recommendations of such a body may have with legislatures and executives is shown by the fact that the California legislature enacted and the Governor approved thirty-four bills proposed by it at the recent session.

The report reveals that in the past two years, the California Judicial Council has sponsored an exhaustive survey of the condition of judicial business in the courts of the state, and a research of the judicial systems of other jurisdictions in the United States and Canada; has, by a number of effective measures, increased the efficiency of the courts in disposing of cases and clearing their calendars; and has prepared and caused to be introduced in the legislature fifty bills and one constitutional amendment, for the improvement and simplification of practice and procedure.

The California Judicial Council was created by constitutional amendment adopted in 1926. Its first report was presented so soon after its creation that definite conclusions upon many pressing subjects were impossible. In the biennial period since the first report, the Council has made an extensive study of the work in the courts of the state, as well as of the principal judicial systems of the United States and Canada. As a result, the Council in this Second Report submitted a number of definite recommendations, to the Governor and Legislature, in the form of proposed legislation.

The survey of the judicial business of the state courts, and the research of the procedure in other jurisdictions were made for the Council by Judge Harry A. Hollzer of the Superior Court and member of the Council. His report was so complete and so adequately set forth the work and accomplishments of the Council during the biennial period that it was adopted as the report of the Council as a whole and constitutes a large part of the Report as published.

An important part of Judge Hollzer's report concerns the grossly unequal division of work among the superior courts of the different California counties. It was found that in one county, San Mateo, more civil and criminal cases were instituted during the last three years than in fifteen other counties combined. Yet each of these counties has one superior judge. Again, San Mateo County, with its one judge, has approximately twice as much litigation as five other counties combined, having a total of five judges.

A considerable part of the research studies made by Judge Hollzer were in connection with an attempt to relieve the congested condition of the superior court of Los Angeles County, in which 45 per cent of the civil and criminal litigation of the entire state is prosecuted. As many judges as could possibly be spared from other counties were assigned to this court by the chairman of the Judicial Council, and also municipal judges, until in February, 1928, an average of fifty-six departments of the superior court was in daily session in Los Angeles County. The result was that the period required to bring an action to trial was reduced from sixteen and eighteen months early in 1927 to three weeks by the summer of 1928.

The "Master Calendar" Plan was also adopted in Los Angeles County, and found to work so successfully that it was extended by rule of the Judicial Council to the superior courts of all counties having three or more judges. By this plan, all criminal proceedings up to the point of trial are handled in one department, designated as the Master Calendar department of the criminal division. This means that the latter department conducted all arraignments, heard all pleas, passed upon all sentences and probations following a plea of guilty, and set all cases for trial in the remaining departments. As a consequence, under this system, all of these other departments were relieved from interruptions of every kind, and were able to devote each court day, exclusively to the trial of cases. The saving to the state and to Los Angeles County effected by the adoption of the "Master Calendar Plan, the report states, amounted to more than seventeen times the sum annually disbursed for the expenditures of the Judicial Council.

Another measure adopted to increase the efficiency of the administration of the courts was the assignment of judges and the mobilization of the judiciary. Superior court judges were assigned during their spare time to assist other courts whose calendars were congested, and in Los Angeles County, municipal judges were likewise assigned from time to time to the superior court. In turn, justices of the peace who have been admitted to practice for more than five years were assigned to replace the municipal judges. By the end of 1928, the number of these assignments totalled more than fifteen hundred. The result was a substantial increase in the efficiency of the courts in disposing of litigation.

The practice of assigning superior court judges to serve as justices of the District Courts of Appeal pro tempore, also served to enable these appellate tribunals to dispose of 592 more cases in 1928 than in 1926. Thus, on December 1, 1926, 22.3 per cent of the cases pending had been on file for more than two years; by the close of 1928, only 7.3 per cent of the pending cases had been on file more than two years.

In cooperation with the Supreme Court, the Judicial Council has also promulgated rules governing the practice in the Supreme Court and District Courts of Appeal. Rules have also been adopted regulating the administration of the superior courts. These latter rules deal primarily with what may be termed the business side of the court, including such matters as the setting and arrangement of trial calendars, and the distribution of business among the judges.

The recommendations of the Council were made in the form of proposed bills, fifty in number, and one constitutional amendment, all designed to provide a more efficient and economical judicial system, and to enable the present number of courts and judges to handle a larger volume of business and to dispose of it more expeditiously. These bills were introduced in the legislature at the recent session, and their contents are summarized in the Second Report of the Council.

The Law of Motion Pictures

THE course on Motion Picture Law, which has been announced for the 1929 summer session of the University of Southern California shows how quickly any new industry develops its own peculiar legal problems, requiring special study and attention. This course, according to Dean Justin Miller, is being offered in the hope that it will serve not only the needs of the law students but of the practicing members of the profession as well. The success of the course in Air Law, which was offered last summer, caused the faculty to plan this experimental course in a new subject this season. "It has been estimated," Dean Miller writes, "that ninety per cent of the motion pictures produced in the United States are produced in this vicinity. Of course, as a result of this fact, many of the problems peculiar to the motion picture industry have developed and must be settled in this territory. In the larger phases of distribution the industry covers the entire world and problems growing out of this phase of its development have become international in character, as is evidenced by the recent controversy over the introduction of American produced films into France."

The description of the course offered is as follows: "Motion Pictures Law: The law appertaining to the production and distribution of motion pictures and talk pictures, including corporate, consolidate and other forms of organizations; reciprocal rights and duties of contracting parties; rights and interests of third parties; restraint of trade; public policy and state constraints; arbitration; a critical survey of various problems of the motion picture industry." The course will be given by Mr. Ralph C. Bennett, who has developed this field of work over a number of years. Mr. Bennett holds the degrees of A. B., M. A., LL. B., and D. C. L. from Yale University and has held a lectureship on Roman Law at Johns Hopkins University and teaching positions in various other universities.

Advisory Vote for Member of General Council and State Representatives

THE Illinois State Bar Association has taken an interesting step with regard to the selection of the member of the General Council and the Vice President and members of the Local Council for the State at the annual meeting of the American Bar Association. The Illinois association has adopted a system of nominating and electing its officers by a ballot of the membership in good standing; and in sending out the preliminary notices about this to the members, the Secretary, Hon. R. Allan Stephens, called attention to the following resolution adopted by the Board of Governors on Dec. 28, 1928:

"WHEREAS, the 1927 Report of the American Bar Associations shows 2,202 members of that Association residing in Illinois and the 1927 Report of the Illinois State Bar Association shows that 1,617 of said Illinois members of the American Bar Association are also members of the Illinois State Bar Association, and

"Whereas, the Illinois member of the General Council, the Illinois Vice-President and four members of the local Council of the American Bar Assocation have, in the past, been recommended for the nomination to the General Council at a meeting held at the close of the first session of the American Bar Association at which only those members from Illinois, who happen to be present, participate, which resulted this year in the selection of the recommended candidates for the aforesaid offices by but twenty of the 2,200 Illinois members of the American Bar Association, and

"Whereas, it is the policy of the Illinois State Bar Association to give all members entitled to vote an opportunity to express their preferences for their representatives in the American Bar Association,

"BE IT RESOLVED, that an advisory vote be taken by Illinois State Bar Association for recommendations to the General Council of the American Bar Association for (1) the Illinois member of the General Council, (2) the Illinois Vice-President and (3) four members of the Local Council of the American Bar Association: that the nominations therefor and vote thereon be made by the same method and at the same time as officers of the Illinois State Bar Association are nominated and elected as provided in Article XV of the By-Laws of this Association, provided, that no person not a member in good standing in the American Bar Association shall be permitted to participate either in said nomination or election.

"Be it further Resolved, that the President of this Association be authorized and directed to transmit the report of the tellers of elections upon the results of said advisory vote to such officers or authorities of the American Bar Association, who may be charged with the duty of making the nominations for such offices, as the recommendation of the members voting as aforesaid."

It will be noted that such selections will be only advisory, as the State Association obviously has no means of changing the national association's mode of nomination or election. However, the proceeding opens up an interesting question as to the method of choosing these representatives and one which is likely to arouse considerable discussion.

(Wide World Photo)

CHARLES EVANS HUGHES, JR.
Recently Appointed Solicitor General of the United States

California State Bar Act Sustained

THE constitutionality of the State Bar Act of California was squarely upheld by the Supreme Court of that State in a decision rendered May 30. The

court, however, decided that the State Bar had no control over members who are holding judicial positions. Judges are directly prohibited from practicing law by the Constitution, the Court pointed out in an opinion by Associate Justice Richards, and are therefore not within the meaning of the Act. The question arose on a petition of the State Bar for a writ of mandate directing Judge Marshall F. McComb of the Superior Court of Los Angeles County to require Judge Carlos J. Hardy, a judge of the same court, to submit himself to a citation issued by a special committee of the Board of Governors and be sworn and give testimony as to his acceptance of a certain check for legal services from Angelus Temple.

In the proceeding before the Supreme Court, we are told in an editorial in the San Francisco Recorder, counsel opposing the application for the writ of mandate vigorously attacked the right of the legislature to create the State Bar as a public corporation. The Court held that it was perfectly competent for it to do this, because of the public character of the profession of the law. In commenting on the power of control and discipline lodged by the Legislature in the State Bar, Mr. Justice Richards said that the "membershp, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control; and it has never heretofore been considered, so far as we have been made aware, that, at least in this commonwealth, the exercise of a reasonable degree of regulation and control over the profession and practice of the law constituted an intrusion into the domain of our State organization constitutionally assigned to the judicial department thereof."

Radical Changes in New York Property Laws

RADICAL changes in the property law of New York are made by the Act passed by the legislature at its recent session, now catalogued as Chapter 229 of the Laws of 1929. This legislation follows the recommendations made by the Commission of Fifteen appointed by the Governor of the State, the President *Pro Tem* of the Senate and the Speaker of the Assembly. It may be compared, we are told in an address made by Hon. George A. Slater, Surrogate of the County of Westchester and Member of the Commission to Investigate Defects in the Law of Estates, to "the recent change in the English Law of Property effected in 1925 and the reform in this law in Pennsylvania, effected in 1917, which has worked so well and to the advantage of the people of that Commonwealth."

Surrogate Slater's address summarizing the recommendations of the Commission which were subsequently adopted by the legislature was delivered at the Annual Meeting of the New York State Bar Association last January. The first reforms referred to are changes in the law of Descent and Distribution of Estates. Here the distinction between real and personal property considered as assets of the estate has been abolished and one rule of succession and one class of distributees to take both such properties has been established. "All existing canons of descent are abolished," he says. "All distinctions between persons taking as heirs at law, or next of kin, are disestablished. A unified system of descent and distribution is created with a single class of persons substituted as entitled to take both real and personal property." Furthermore, in harmony with the policy of equality between men and women, "the rights of the husband and wife are made uniform as to inheritance, succession, and the right of election to take against the will . . . Under the new law the property of the deceased spouse is given more largely to the surviving spouse where it properly belongs. It gives a fee value to a more adequate share of the real estate to the surviving spouse, in place of relics of by-gone days—inadequate dower or courtesy. A real reform lies here—something material is substituted for something illusive. It is enlarged dower given in a different manner and is more substantial."

Consistently with the attitude manifested in the foregoing, dower and curtesy are eliminated. "In another group of reforms the common law estate, by the curtesy in the real property of the wife, is abolished. It is also provided that no inchoate right of dower shall be possessed by the wife during coverture, and no widow shall be endowed in any lands whereof her husband became seized of an estate of inheritance subsequent to the date when the law takes effect. Future dower, future inchoate dower and curtesy are abolished. Present curtesy initiate is deleted because it is only a status. (Albany Savings Bank vs. McCarty, 149 N. Y. 71.) Present inchoate dower is retained because it is a right. (Lawrence vs. Miller, 2 N. Y. 245.)

Provisions regarding the right of the surviving spouse to elect to take against the will in the absence of testamentary, or in case of, unjust provisions, are mentioned as another advanced reform. "A personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy," we are told. "The change provides against and prevents disinheritance. It follows the Pennsylvania Act of 1917, which contains the right of election against the will. The right of election now obtains in twelve states of the Union, including the state of Illinois. In case of intestacy we have given greater rights to the surviving spouse as against other relatives. In proposed Section 18, Decedent Estate Law, we provide that these intestate rights shall obtain as against any will that a testator may make, with the exception that the testator may create a trust in such an amount as the intestate share may be or a larger amount, with income payable to the surviving spouse for life. But even then, the surviving spouse shall have the limited right to elect to take as against the trust, the sum of $2,500 in cash, absolutely, which shall be deducted from the corpus of the trust, and the terms of the will shall otherwise remain effective.

"The right of election covers the identical intestate share, except where the intestate share of the surviving spouse is the whole of the estate, the right to elect shall be limited to any election to take not more than one-half of the net estate. Such election to take against the will must be made within six months after the issuance of letters testamentary, unless the right is extended by the Surrogate, as provided. The right to take against the will in other states is absolute. The Commission proposes to permit the decedent to place such share

in trust so as to safeguard the principal of the trust against a spendthrift spouse."

Another change recommended and approved provides for increased exemption for the benefit of the family, the surviving spouse and minor children. Another gives the executor a statutory power to sell real estate in certain cases where the will does not contain it. "This is not a revision; it is a discovery. The executor may sell real estate where the will lacks the power of sale. Notwithstanding the absence of a valid power of sale, every will shall be construed to give to the executor, or trustee, the power to take possession of, collect the rents from, and sell, mortgage or lease real property. Likewise, the same powers are to be exercised by the administrator with the will annexed, or by a substituted trustee, or by the administrator in intestacy. Such power shall not be exercised, however, where the will expressly prohibits it; where the will provides that the real property shall not be sold, nor shall it affect real property specifically devised; except the power may be exercised if necessary, for the payment of administration and funeral expenses, debts or transfer taxes . . . The argument is that, if an executor or administrator can sell personality, why not real estate? Many wills omit the power of sale clause through the oversight of those who draft them. The statutory power of sale will obviate the necessity in many cases of bringing proceedings for the sale of infants' and incompetents' real estate, or property held by trustees. Actions to partition a decedent's realty with their burdensome expense and delay may also be eliminated. But it has been thought best to circumscribe the authority to sell with regard to real estate, with the approval of the Surrogate. Title to the real estate does not vest in the executor or administrator as it does under the English Act of 1925."

The law contains further provisions, among them one relating to the judicial determination of the death of a person who has disappeared, and making such determination valid and binding to the extent of protection to those concerned with subsequent administration. The proposed law makes provisions for saving prior wills, this detail representing a later change of position on the part of the Commission. The personnel of the body whose work has received such notable legislative approval is as follows: James A. Foley, Chairman; Edmund B. Jenks, Vice-Chairman; Homer E. A. Dick, Secretary; Louis B. Hart, George A. Slater, George A. Wingate, Maurice Bloch, Henry R. Chittick, George R. Fearon, Leonard P. Lipowicz, Thomas I. Sheridan, John G. Saxe, Herbert B. Shonk, Horace M. Stone, and Cornelius W. McDougold. Carlos C. Alden is Counsel and Richard Cummins is Assistant Counsel.

Texas Puts Constitution Into Her Schools

TEXAS has passed a very satisfactory law requiring the teaching of the Constitution in the schools, according to a letter received from Mr. W. Erskine Williams of Fort Worth, Vice President for Texas. On March 18, 1929, the Governor approved the measure, which had previously received the unanimous indorsement of the Texas Bar Association. The State Superintendent of Education cooperated very effectively in securing the passage of the act and assurances have been given the proper text book will be secured. The hearty cooperation of the teachers of the State is anticipated. Following is the text of the measure:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. In all schools, public and private, there shall be given a course of instruction in the sixth and seventh grades to all pupils, in United States History, and Civil Government. In addition thereto in all high schools, normal schools, colleges, universities and other educational institutions in any manner supported by public funds or supervised by the State, there shall be given a separate course of instruction on the Constitution of Texas and of the United States; and no student shall be graduated who has not passed a satisfactory examination in such course.

SECTION 2. In all grade schools as above provided, elementary instruction in the Constitution shall be given for at least one-half hour in each week of the year; in all high schools, normal schools, colleges, universities and other educational institutions advanced instruction during one term of the year.

SECTION 3. No person shall be granted a certificate to teach in the schools of this State unless he or she shall have passed a satisfactory examination in the subjects referred to in Section 1 of this Act.

SECTION 4. No student shall be enrolled in the high schools of this state or in any normal school, college, university or other educational institution as above described without previously passing a satisfactory examination on the subjects defined except on condition.

SECTION 5. The State Text Book Commission or body charged with the duty shall select and prescribe the proper text books for such courses of study, and books for supplementary reading, which books shall be used in schools of this state for the purpose of this Act.

SECTION 6. It shall be the duty of each one having charge of the educational institutions above described to make the proper arrangements and orders so that the provisions of this Act shall be carried out in the spirit thereof.

Remarkable Length of Judicial Service

THIRTY six years, or exactly half his life, as a member of the Supreme Bench of Arkansas is the remarkable record of Associate Justice Carrol D. Wood, whose resignation from that tribunal took effect May 20. Justice Wood is the first Justice to retire under the act of 1923, which allows retirement with full pay to Judges who have reached the age of seventy and have served at least ten years. The Arkansas Bar Association and the Little Rock Bar Association conducted special ceremonies in honor of Judge Wood in the Supreme Court Chambers, following the handing down of opinions on May 20.

The retiring Justice was elected prosecuting attorney for the tenth circuit of his State when he was twenty five years old, according to the Little Rock Gazette, and four years later was elected judge. He held this position until he was elected to the Supreme Court to succeed Judge W. E. Hemingway, who resigned in 1893. Judge Wood is said to have written "almost 3000 opinions during his thirty six years on the Supreme Bench and to have participated in approximately 20,000 decisions. His first opinion appears in Vol. 58 of the Arkansas Reports and his last will appear in Volume 179." On receipt of his resignation Governor Parnell announced the choice of Judge Turner Butler of Hamburg, for the past fifteen years Judge of the Tenth Judicial Circuit, as his successor.

IS THE FISHING LAWYER AN OUTCAST?

Convincing Exposition of the Important Aid Which Fishing, Properly Undertaken, May Render to Active Member of the Profession—Court Sustains Protest Based on Opening of Trout Season—Biblical Precedent for Recourse to Fishing in Time of Stress*

By Andrew Price
Member of the Marlinton, West Virginia, Bar

IS the fishing lawyer an outcast? The answer is in the negative. But before going into details of scientific value as to this important subject, it will be necessary to qualify the witness to a certain extent. The lawyer who writes this is a gentleman who does his own work, and who has had a license to call himself a lawyer for thirty-seven years during the whole period of which he has been offering to practice in a mountain county in the Appalachian mountains, where the men are all true, and the women are all beautiful, and the fishing is the finest in the world. Small mouthed black bass and mountain trout are the species most to be desired, but there are a number of other kinds such as the wall-eyed pike, the suckers, the chubs, the cat-fish and the like which go to make up the year. The county is Pocahontas, on the western slope of the Allegheny Mountains. The county is eighty miles long. It is said to be most broken part of the earth's surface. By that is meant that it has more mountain to the square inch. In it eleven rivers head, including the uttermost fountain of the Ohio River. The drainage to the last drop is outward. That is all its water is received direct from heaven. It is a noted blue-grass county. That is a grass produced in limestone levels which has a bloom that is blue. It is affectionately called the Pearl of the Alleghenies.

Your orator, as the Virginia chancery forms so charmingly describe the distressful complainant who has been inveigled into a law suit, has always had his doubts as to his right to call himself a lawyer. On the few occasions when he has been cornered and placed upon the witness stand, there with his back to the wall, his face to the majesty of the law, and his naked and perspiring soul bare before the infinite, he has always answered that by occupation he was an attorney. But when it comes to the question of whether I was a fisherman, I have always maintained to the cockeyed world that I could catch fish with any man and that I was capable of a far flung fatal hook, and if that be boasting, make the most of it.

It is true that I am in the sear and yellow leaf, and that most of my fishing is in my head, but I was a fisherman once. Like the soldier who said that he was a corporal once, but since reduced.

The question was presented clear cut in the dim red dawn of my youth. In those days the rich prepared for the practice of law by sitting under the famous Minor of the University of Virginia, one of the greatest instructors that this country has ever had. I was not under Minor. I belonged to the kind that entered not by this straight gate but went around some other way, the consequence of which being that we have been considered thieves and robbers ever since. Minor solemnly warned his classes against fishing. He must have classed it as one of the deadly sins. His legal children have often mentioned it. I combatted his logic from the start. I think I know the reason for his ill considered dictum. He was but a teacher. He spoke from the cloisters of a college. He had never put a squadron in the field nor the division of a battle knew, more than spinster. His advice might have been good for the common run, but not for the eagled eyed men that he was turning out. These men were entitled to read a lesson that would keep their hearts from fainting and their souls from sleep, to be found in the woods and hills.

Successful lawyers are men of many parts and it is hard to say just what is the quality that makes them invaluable to those caught in the fell clutch of circumstance, but perhaps the ability to find the answer to problems that others have failed to solve is the secret of the success of great lawyers. And it seems to me that the solution of the most desperate cases comes with the suddenness of a flash of light. It comes to the lawyer who will prepare the setting to receive it and who purges his soul in the wilderness.

There is a Biblical example. After the most searching experience that man has ever known, the apostle, Peter, found himself the responsible member of the board charged with the salvation of the world. In the strain and stress of the day, Simon Peter said unto them, "I go a fishing," and they say unto him, "We also come with thee." In addressing this illuminated audience, I refer to this with all reverence, for we know that wise men ever since then have had recourse to this primitive and powerful remedy when the burden became too great to be borne.

In the Southern Judicial District of West Virginia, composed of twenty-four counties, the resident judge had before him an important case that he could not try, and invited the South Carolinian, Judge Woods, of the Circuit Court of Appeals, to attend at Charleston, and preside. Charleston, West Virginia, is not the biggest city in the nation, but it seems to me some times that it puts on more airs. The famous judge came and the trial proceeded through the anxious days until it had

*This is the first of a series of articles intended to emphasize the relationship of the law and various diversions heretofore commonly but mistakenly supposed to be alien or even antagonistic to the practice. Mr. Price, the author, is a member of the Bar of Marlinton, West Virginia, and bears the title of piscator emeritus in those parts.

all but ended. Late in the afternoon, that stage was reached, when it became a matter of deciding whether to finish that day or to come back in the morning. The judge said: "I will instruct tomorrow." Then uprose a fearless young advocate who came from a long line of lawyers who said in effect: "But, your honor, this is the 30th day of April." The judge looked bewildered. It was explained to him that the trout season opened on the 1st day of May, and that was the time to leave the gray pavements and the crowded roadways for the tumbling brooks. Judge Woods said that he had heard many reasons for speed or delays in courts, but that this was the first time that he had ever known an important case to be affected because one of the lawyers wanted to go fishing. But being one of the most genial men, with an understanding heart, the case was finished and the lawyer went fishing.

Life in Charleston may be a little complicated but the salt of life has not lost entirely its savor. Before Judge Woods left the city, Judge McClintic of the Southern District, gave him a supper, and after they had eaten there was speaking there that night. Judge McClintic led off with a review of the mighty attainments of Judge Woods, and said that there was one thing lacking and that was his education in regard to the importance of fishing and proceeded to instruct him along that line, until the wonder grew how any man could have reached Judge Wood's heights who had neglected fishing. It could only be accounted for by treating it as an exception. R. S. Spillman fervently reminded the guest of honor that there had never been but one really great law book written, and that was by a fisherman. That he referred to the Compleat Angler by Izaak Walton. And so Judge Woods went home knowing about the streams where the trout were jumping crazy for the fly.

It is bred in the bone. It is implanted in the heart. It is graven upon the tablets of the memory. One of our neighbors moved to the state of Kansas and speedily came home again and said that he would not live where he could not hear the water running over the rocks.

It is all well enough to be diligent in business praising the law, but it is nevertheless a fact that a dull lawyer is worse than no lawyer, and all work and no play will even make a boy dull. Gold streets and precious stones leave me cold, but I trust that the Elysian fields have plenty of running water, ready for the faithful lawyer during his long vacation.

There is no room in this serious discussion for fish stories. The subject lends itself to verbosity. The great deep is broken up. If this were not a scientific paper I should like to give facts and figures and how great fish continue to grow until long after they are dead. I mean that this is psychological treatment. I would like to sit by your fire and talk the night away. To relate the strangest tale I have to tell—which no one else believes—of taking fifty trout in fifty minutes walking by the side of a stream and flicking a fly ever and anon, all the time carrying a burden on my back. Or at times I have stood in the clear waters of the Greenbrier River and fought black bass until the earth trembled. All those things will have to wait for a more convenient season. Also a list of the great lawyer fishermen that I have known. I will let that part of the subject pass by laying down the postulate that no great man ever despised fishing. The economic value of fishing. This point will be rested on the dictum of Jorrocks, that what man spends in fishing he saves in epsom salts.

A rush of words to the head. That is what this is. It is too much like developing a fine spun theory in a brief for the dull cold ear of a supreme court. Please waive the egotism and let me give you one or two instances in which fishing has given me the relief prayed for. One civil case, and one criminal case, may be forgiven.

My neighbor and friend for nearly forty years standing is a gentleman of the Jewish religion. He is a true pioneer. He was born in Russia and at a time when it was forbidden for his class to leave his community. He escaped and literally broke through the frontier. I cannot remember what his first name was but his American name is Paul Golden. I tell him he got Paul from the Gentile apostle, and Golden from the Golden Rule. After making a fortune in his chosen occupation as a merchant, this true pioneer went into the log and saw mill business, then he automatically became colonel. He then shook hands with old man Trouble. Once on the train coming home he shared a seat with a stranger and they fell into a conversation. The stranger said: "I am going to Marlinton to see what I never saw before—a Jew in the lumber business." Golden said in reply with great earnestness: "You will see a pitiful sight!"

Tea Creek, a West Virginia Trout Stream

One morning Col. Golden came to me with a complication. Gentlemen, you understand that this is

Fishing—Almost Anywhere in the West

under the seal of our profession. He had a batch of half a million feet of fine saw logs, bought at the head of a hollow, which he had snaked down to the mouth of the ravine at which he had a mill set, when he found to his horror that an embattled farmer owned a tongue of land blocking the exit. The jig-saw puzzle style of granting public lands in Virginia caused Thomas Jefferson to adopt the square section system in the western states. In West Virginia, a right of way cannot be secured except by consent for a private purpose. We seemed to have no rights in the case, and if we had, the saw logs would have lost all their bloom while it was being fought. I begged for a day to ponder on the matter. Of course, I could not tell the business man that I wanted to fish on it. He would not have understood. In fact in his desperation he might have fled to another attorney.

That afternoon between bites one word came to me from some mysterious source and that was "detinue." Our logs were being detained. Undoubtedly. Detinue and a detinue bond would authorize the sheriff to seize personal property and deliver it to the plaintiff. The sheriff not having teams would be only too glad to let the plaintiff do the toil of delivery. We had the writ in a few minutes and the logs across in a day or two. The land owner made no defense and was glad to agree that if we would pay the cost, about seven dollars, the suit should be dismissed agreed. It is still a mystery to me whether the righteous action of detinue can be stretched to cover such a case as I have described.

That is not a fish story. A fish story is something like the following, to-wit: "Have I ever told you an untruth, Katherine?" And the girl replied: "I wish I could trust you absolutely, Albert, but I heard you tell uncle that you had caught a brook trout weighing three pounds and six ounces." And the tears came into her eyes while the young man gazed out of the window.

A good many years ago, the body of the county converged on the court-house to assist (as they say of the audiences of that magnificent new art, the moving pictures) at a murder trial. I am no good at this kind of a show. I feel like the old family solicitor so feelingly displayed in "The Bellamy Trial," by one of the smartest girls in the world. In such a trial I feel like a man eating soup with a splinter. The defendant was a tall mountain man in his twenties. His beautiful girl-wife was there in an interesting condition, very much concerned by her husband's predicament. The prisoner seemed to be a normal man, except that he seemed to have no imagination or power to look forward. That is fear of the future. He must have had a very hazy knowledge of the law prohibiting the killing of a man promiscuously. He had secured the services of an eloquent lawyer who was sick in bed when the case was called. The judge appointed

me to defend him. This duty carries no fee but it cannot be declined.

The charge was shooting and killing a Syrian peddler in the woods and taking his money and goods. The evidence was more or less conclusive. Wesley Mollohan, the wise man of West Virginia, now gone to his reward, suggested the defense that a Syrian peddler was not a person within the meaning of the statute. So I decided to take a continuance to give the proper lawyer time to get well. It was in January and it was more than sixty miles to the place the case came from. The boy's stepfather was sick and unable to attend. On the ground of the absence of the step-father, we asked for a continuance. The boy's mother was put on the stand as a witness in support of the motion. The trial judge took a hand: "You say, madam, that Joe is sick and cannot get here. What would he testify if he was here?" The court got a remarkable answer: "Well, judge, to tell the truth about it, me and Joe have not yet made up our minds, what we will swear to."

So the case went to trial and for some days we wallowed in the sanguinary details of a murder. As Patrick Henry shouted to the court and jury in this same county of Augusta when it included the site of Chicago, blood was involved.

It has been more than twenty years ago, but it is still a bitter memory, of the jury retiring to their room and after being out awhile, returning into court with a death verdict. At our courthouse when a jury is ready to report, they pound on the door to attract the attention of the sheriff, who is to come and march them into the courtroom. That has the melancholy sound that is like the crack of doom.

Then the positive judge who had more than a local reputation as speaker against the use of tobacco, tea and coffee, pronounced the death sentence.

Up to that time in this ancient county there had never been a man sentenced to death. The prisoner showed no emotion, but it robbed me of my rest. It was in the dead of winter in a country where the spruce and other timber growths duplicate Canada's forests, but I got excused for a day and went fishing in Stony Creek, a bold stream fed by big limestone springs, and the sun shone, and from the snow water, I took twenty fine, fat trout, and got back some courage and some peace of mind. I girded up my loins and put up the inconsiderable sum needed and took the case to an appellate court. The death verdict was set aside. The next trial sent the defendant to the state prison, and he has long been restored to his friends and relations.

There may be a fine thread of reason running through this thesis, but you never can tell. It all depends upon the ear of the hearer. It may be apparent to some and not to others. Some ears are so attuned that they cannot hear the evening song of the flitter bat. Einstein rather prides himself upon his incomprehensibility. It is not that his thought is so involved, it is because he is inarticulate. He ought to get himself a lawyer who is gifted with words so that he could be understood.

Daniel Webster was a man of noble thoughts and he got his imperishable wisdom fishing along the streams. He is an early example of the necessity of passing into the silence to emerge with healing in his winged words.

Not so very long ago, it was my most painful duty to pronounce a death sentence on a boy who had been convicted of shooting and killing a man and robbing his money belt of some forty hundred dollars. That was another case of the dreary, dreary moorland, and the barren, barren shore. The only sign of emotion that I observed in the defendant was that he blushed like a girl. The good governor of the State did what the trial judge was unable to do, changed the sentence under the verdict to life imprisonment. That trial was in June. That afternoon, I was no fit company for myself. And like Simon Peter, I went afishing.

Failure of Biblical Allusions in North Carolina

The Supreme Court of North Carolina heard recently a suit for the possession of a city lot in which the plaintiff claimed ownership by virtue of a tax deed which was held defective in several respects and resulted in the plaintiff's defeat, says the *New York Times* of March 19. In submitting the case to the Supreme Court the losing attorney in the case of Dunn against Jones quoted Scripture as follows:

"When the rich young ruler went to Christ and asked what he should do to inherit eternal life, the Great Teacher told him how he could do so, and the young ruler told Christ that he had done all of the things enumerated, and asked the Master, 'What lacketh I now?' and the Great Teacher told him what he should do in addition to what he had done. I most respectfully contend that I have done what is laid down in the statutes in cases of this kind, and I most respectfully ask this court, 'What lacketh I now?'"

The Supreme Court, in an opinion by the entire bench, brushed aside the plaintiff's biblical allusions with quotations of its own, as follows:

"In the first place, the plaintiff 'lacks' an accurate reference to the rich young ruler, as will appear from an examination of the record (Mark, x, 17-23; Luke, xviii, 18-23). The biblical record discloses that the rich young ruler lacked only one thing; while, on the other hand, the title of plaintiff lacks several essentials to a valid tax title."

After pointing out the defects which made the tax deed invalid, the court continues:

"The biblical record in Luke, xviii, 18-23, states that, when the rich young ruler heard the words of the Master, 'he was very sorrowful, for he was very rich.' In the case under consideration, if the plaintiff is sorrowful, by reason of this decision, it is because he has failed to observe and strictly comply with the statutes determining the validity of tax titles."

New Yale Law School Dean

Charles E. Clark, Lines Professor of Law in the Yale Law School, has been appointed Dean of the Yale Law School. On July 1, 1929, he will succeed Dean Robert M. Hutchins, who has been elected president of the University of Chicago. Prof. Clark is the author of "Code Pleading" published in 1928, and of "Real Covenants" published in 1929, as well as of numerous articles in the law reviews on procedural and property subjects. He is also co-author with Harrison Hewitt and the late Judge Livingston W. Cleaveland of "Probate Law and Practice," published in 1915. He is one of the Property Advisers of the American Law Institute of Philadelphia, and is draftsman of the Uniform Income Apportionment Act for the National Conference of Commissioners on Uniform State Laws.

PROPOSED LIMITATIONS UPON OUR FEDERAL COURTS

Important Features of Certain Bills to Restrict Activities and Functions of National Judiciary—Far-Reaching Effects Would Follow Their Passage — One-Sided Policy Embodied in Measure to Restrain Injunction in Labor Disputes — Proposals to Abolish Diversity of Citizenship as Basis for Jurisdiction and to Curtail Judge's Right to Comment on Evidence Called Unwise*

By Hon. Gurney E. Newlin
President of the American Bar Association

THE title I have chosen is not intended to convey the impression that I propose that certain limitations be placed upon our Federal courts; rather it is my purpose to call to your attention several bills which have been and are again to be introduced in Congress, which are designed in one way or another to curtail and restrict the present activities and functions of our Federal District Courts and judges. Each of these bills concerns a subject of first importance, and, if enacted into law, would have a far-reaching effect upon our national judiciary system. Time does not permit a detailed analysis of these proposed pieces of legislation. I wish, however, to direct your attention to some of the more important features of the bills and point out what seem to me some rather serious objections to the proposed legislation, and the effect they will have on our Federal judiciary.

I

Jurisdiction of Federal District Courts to Issue Restraining Orders and Injunctions in Cases Involving or Growing Out of Labor Disputes

One of the bills proposes to place certain limitations and restrictions upon the present jurisdiction of the Federal Courts to issue restraining orders and injunctions in cases involving or growing out of labor disputes. With respect to such present jurisdiction it will be sufficient to say that Section 52 of Title 29 of the United States Code Annotated considerably restricts the general equity powers of Federal Courts in cases involving or growing out of a dispute concerning the terms or conditions of employment. It has been held that the section recognizes and allows peaceable picketing and legalizes the primary boycott and orderly and peaceful strikes and takes combinations or agreements to bring about such strikes out of the purview of Section 1 of the Sherman Act. The bill is entitled "A Bill to Define and Limit the Jurisdiction of the Courts of the United States and for Other Purposes." It is designed and intended to be all-inclusive of the power and jurisdiction of the Federal Courts to issue restraining orders and injunctions in cases involving or growing out of labor disputes. If enacted into law the whole authority of the Federal Courts to issue injunctions in such cases will be contained within the four corners of this piece of legislation.

The subject of injunctions in labor disputes is one concerning which much has been written and spoken during the past twenty-five years. It is not only a matter of importance to the members of the Bar, but it is one of vital interest and concern to thousands of industrial employers and employees in this country because of the manner in which the subject touches upon and affects their daily activities. In my opinion the bill is objectionable for a number of reasons. I shall briefly refer to some of the more serious objections.

The bill declares a public policy of the United States with reference to the right of employers to deal individually with employees, and with reference to the unionization of labor, and that contracts contrary to the public policy shall be unenforceable and shall afford no basis for the granting of legal or equitable relief by a court of the United States. Built upon a premise which discards individual bargaining between employer and employee, the public policy of the bill, in effect, declares that it is necessary for labor associations to be free from interference or restraint from employers, so as to indulge in concerted activities not only for the purpose of collective bargaining, but also for the purpose of "other mutual aid and protection" with no mention of any corresponding protection to employers. I doubt the wisdom of having the Federal Government enunciate such a one-sided policy. Our Government was conceived as, and is intended to be, a Government of and for all the people, not merely for a particular class or group of people. And certain it is that we can never hope even to approximate such a type of Government if we pass laws whereby the Federal Government adopts a policy which, through the operation of its judiciary, is designed to create a marked perference for a particular class. Such class legislation is bound to produce undesirable social results, and will be highly detrimental to the welfare of the general public. The bill then states in specific terms that, among others, contracts wherein an employee agrees not to join, become or remain a member of a labor organization, or agrees that in the event he does join, become or remain a member of a labor organization, he will withdraw from em-

*Address delivered to the Association of the Bar of the City of New York at the dinner given in his honor on the evening of Thursday, April 18, 1929.

ployment, shall be considered contrary to the public policy of the bill.

In the first place, such a provision would have the practical effect of arbitrary denial of the right of the employer to contract with employees on non-union terms, with no corresponding limitation upon the employees' freedom to contract. It would make freedom of bargaining an actual reality for the employee but a mere empty phrase so far as the employer is concerned. In the second place, it seems to me very doubtful whether such a provision is constitutional. It is well established that the general right to make a contract in relation to his business is part of the liberty of the individual, protected by the Federal Constitution from arbitrary legislative interference. In the *Adair* case, the United States had under consideration the portion of an Act of Congress which made it unlawful for an employer, subject to the Act, to threaten any employee with loss of employment or unjustly discriminate against him because of his membership in a labor organization. The United States Supreme Court held this portion of the Act to be unconstitutional and in the course of its opinion said:

"It was the legal right of the defendant, Adair,—however unwise such a course might have been,—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Section 4 of the bill provides that such things as intimidation, coercion or threatened violence or fraud may not be enjoined or restrained by a Federal Court. Apparently nothing short of actual violence or fraud is to be deemed sufficient to invoke the restraining power of a Federal Court of Equity. Such a rigid requirement would minimize the benefits of the "preventive" features of injunctive relief.

Not only does the bill purport to legalize a number of activities on the part of labor associations which are unlawful under existing law, but it also extends these immunities and exemptions beyond the parties affected in a proximate and substantial sense by the cause of the dispute to those who are affected merely in a sentimental or sympathetic sense. This, of course, is the exact thing which the United States Supreme court flatly refused to do in the *Duplex* case, when considering the immunities and exemptions afforded labor associations by Section 20 of the Clayton Act. In the *American Steel Foundries* case Chief Justice Taft, in delivering the opinion of the Court, said:

"The object and problem of Congress in Section 20 (of the Clayton Act), and, indeed, of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand; and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other."

Section 5 prohibits the issuance of injunctions in labor disputes under Section 16 of the Clayton Act. Its effect would be to change the existing law as declared by the decisions of the Supreme Court in *Grenada Lumber Company* vs. *Mississippi*, and in the *Bedford* case, where the Court said:

"An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed (*Grenada Lumber Co.* v. *Mississippi*, 217 U. S., 433, 440, 54 L. Ed. 826, 830, 30 Sup. Ct. Rep. 535)."

Section 6 of the bill makes practically impossible the recovery of damages such as was approved by the Supreme Court in the Coronado case.

Section 7, in addition to the findings of fact which must now be made before a Federal Equity Court can issue an injunction, adds two new and rigid requirements as follows:

"That as to each item of relief sought greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

These novel requirements are foreign to all principles of equity, jurisdiction with reference to issuance of injunctions, and would have the effect of seriously restricting and throttling the power of federal courts in that regard.

Section 7a prohibits the issuance of an injunction to a complainant who has failed to make every reasonable effort to arbitrate his dispute. There is, however, no corresponding provision requiring defendants to use similar efforts. In other words the duty to arbitrate is not reciprocal.

Section 8 provides, in effect, that, except in certain special instances where a person is charged with indirect criminal contempt for violation of a restraining order or injunction issued by a Federal Court, he shall be entitled to trial by a jury of the district wherein the contempt was committed. The effectiveness of an injunction to prevent an irreparable injury to property is dependent in large measure upon the power of the Court issuing it to enforce it and to punish those who violate it, and this, in turn, is dependent upon the power of the Court itself to pass upon the question of whether in the particular case a person has violated the injunction. It seems to me that the bill will hinder and obstruct rather than aid and make possible a more complete and equitable reconciliation of the respective rights and interests of employers and labor associations. It creates a marked preference in favor of a designated class by granting its members almost complete immunity from interference by a Federal Equity Court; it enlarges this favored class to include those who are affected by or interested in the labor dispute merely in a sentimental or sympathetic sense. It justifies and makes lawful the secondary boycott. It confers upon labor associations a right to do all things necessary or desirable to be done in furthering their interests, even though such things have been held by the Courts in the past to constitute direct damages to employers, that is restrainable through injunction. Even more applicable today than twenty years ago when first stated, is the following language of Mr. Justice Brewer:

"Government by injunction has been an object of easy denunciation. So far from restricting its power, there never was a time when its unrestricted and vigorous exercise was worth more to the nation and for the best interests of all. As population becomes more dense, as business interests multiply and crowd each other, the restraining power of a court

of equity is of far greater importance than the punishing power of a criminal law. The best scientific thought of the day is along the lines of prevention rather than those of cure. We aim to stay the spread of epidemics rather than to permit them to run their course and attend solely to the work of curing the sick. And shall it be said of the law, which claims to be the perfection of reason and to express the highest thought of the day, that it no longer aims to prevent the wrong but limits its action to the matter of punishment? To take away the equitable power of restraining wrong is a step backward toward barbarism, rather than a step forward to a higher civilization."

II

Jurisdiction of Federal District Courts in Civil Cases Where Their Jurisdiction Is Based Upon Diversity of Citizenship

The second bill which I desire briefly to discuss proposes to abolish diversity of citizenship as a basis of jurisdiction in our Federal Courts. The original source of this basis of jurisdiction is Section 2 of Article III of the Federal Constitution, which provides:

"The judicial power shall extend . . (among others) . . to controversies . . between citizens of different states. . . ."

In accordance with this constitutional provision Congress has from time to time enacted laws which have defined the scope and limitations of diversity of citizenship jurisdiction in the Federal Courts.

While the conditions under which diversity of citizenship jurisdiction might be invoked have varied from time to time according to the enactments of Congress, yet the basis therefor, as provided for in the Constitution—that is diversity of citizenship as a type of Federal jurisdiction—has remained a part of our national judiciary system for the past 150 years. Furthermore, since the passage of the Judiciary Act on March 3, 1875, the past half century has witnessed a gradual but steady expansion of the jurisdiction of Federal courts. Notwithstanding these facts it is now proposed to abolish diversity of citizenship jurisdiction entirely.

The diversity of citizenship clause was inserted in the Constitution so as to secure to the citizens of various states, and particularly, its non-resident litigants, impartial tribunals, free from local prejudices, strifes and politics. Approximately 120 years ago, in the case of the *Bank of the U. S.* v. *Deveaux*, Chief Justice Marshall observed that:

"The judicial department was introduced into the American constitution under impressions, and with the views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are no less susceptible of these apprehensions. . .

It is evident, therefore, that this particular clause was inserted in the Constitution for the primary purpose of assuring judicial protection to the stranger and his property who might be within the confines of a state other than that of his residence. It declared a policy in favor of making available to non-resident litigants an impartial tribunal that presumably was free from the influence of local prejudices and politics.

One of the principal arguments advanced by those who seek to deprive the Federal Courts of this historical basis of jurisdiction is that there is no longer any appreciable danger of local prejudice among the state courts. It has been said that "the mobility of modern life has greatly weakened state attachments," and that during the time intervening since the Constitution was adopted this country has undergone such a radical economic transformation that practically all danger of discrimination against non-resident litigants has been removed. While perhaps the danger of local prejudices or bias has somewhat abated during the past century, yet it has by no means disappeared to such an extent that it is a negligible factor, in present day affairs. We cannot entirely dismiss from consideration the fact that in the majority of our states judges are elected for a term of years, whereas Federal judges are appointed to serve during good behaviour. I do not mean to question the integrity or highness of purpose of any state as a whole with respect to administering justice as impartially to non-resident litigants as to its own citizens. However, we cannot escape the fact that there are today, and probably always will be, a certain number of individuals in authority who, for one reason or another, permit local prejudices, policies and interests to influence them in favor of resident litigants, the degree of which is a matter difficult to ascertain. A judge's desire for re-election, his local pride, and state patriotism, often give color which the judge himself may not feel, but which, nevertheless, has its influence against non-resident litigants. In international disputes the people of the United States are united by a common spirit of national pride. In a country composed of as many states as ours, each having its own particular interests, numerous issues and controversies are bound to arise between the several states and their respective citizens. When we pass from international disputes into the realm of inter-state issues the complete unity of national spirit rules, and the individual's feelings and opinions are largely moulded in conformity with and are influenced by the varied interests of the several states. It does not seem to me that the reason for inserting the diversity of citizenship clause in our Federal Constitution, namely the potential danger of prejudice to and discrimination against non-resident litigants, whether consciously or unconsciously, has disappeared to an extent which justifies us in abolishing the safeguard afforded by this provision of the Constitution. Chief Justice Taft, in an address at the annual meeting of the American Bar Association at San Francisco in 1922, used these words:

"I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against non-residents is at an end. Litigants from the eastern part of the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a western or southern state court as in a federal court. The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element,—and I want to emphasize this because I don't think it is always thought of—no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South

as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."

Furthermore, even if it could satisfactorily be demonstrated that the actual danger of local prejudice is negligible,—which, as I have stated, I do not believe is the true situation—even so, I seriously question the advisability of stripping the Federal courts of diversity of citizenship jurisdiction. It is not alone a question of whether such danger of local prejudice and bias really exists, but it goes deeper than that—it is a question of throwing into discard a fixed policy of this country with regard to the protection of all of its citizens. The constitutional provision with reference to the diversity of citizenship jurisdiction of the Federal courts is but one form of expression of the policy of the United States that all of its citizens shall have an impartial administration of justice in whatever state or country they may be. The diversity of citizenship jurisdiction clause has stood for over 150 years as a measure of assurance and protection to those who contemplate the investment of their capital in states where it is needed for the advancement of industrial and commercial progress. Under this policy, we have witnessed during the past 50 years a phenomenal development of enterprise and industry throughout the West and South.

Another argument sometimes advanced by those who seek to abolish the diversity of citizenship jurisdiction of the Federal courts is that such a step would materially relieve the present congestion of the dockets of such courts. That such would be the effect in large measure I do not deny, for the reason that at the present time between 20% and 30%, approximately, of the cases arising in the Federal courts are based upon the diversity of citizenship jurisdiction. It is, however, a question whether this is a proper and wise method of accomplishing the desired end. I do not believe that it is. The number of cases based upon such jurisdiction are some evidence of the fact that our citizens find it necessary, or at least believe it to be so, to seek the Federal courts for impartial adjustment of their controversies. If, in order to alleviate the conditions in the Federal courts, something must be done, is it not much better for Congress to give relief by creating more federal judgeships rather than by striking at the heart of a constitutional policy of long standing. The Federal Constitution authorizes Congress from time to time to ordain and establish inferior Federal courts. Neither the Constitution nor any fixed policy of the United States limits the number of such courts that may be established. Another method which has been suggested, and which I believe might be at least worth a trial, is to relieve the Federal district courts of all cases concerning violation of what are generally known as the Volstead and Harrison laws. The dockets of many of our courts are crowded with this class of cases which, if transferred elsewhere, would materially relieve their congestion. Other methods have been suggested, the discussion of which is not possible this evening.

In discussing diversity of citizenship jurisdiction of Federal courts, it has been said by some who are opposed to this basis of jurisdiction that "the situation is aggravated by the freedom of the Federal courts to make local law in accordance with their ideas of 'general jurisprudence', in complete disregard of the declared law of the state." Reference is here made to the doctrine of *Swift* v. *Tyson*, and its various ramifications. No doubt it is unwholesome and unfair to have a double system of conflicting laws in the same state. I think we should realize that however undesirable or unfair this doctrine may be, it is neither an integral nor a necessary part of diverse citizenship jurisdiction, nor was it contemplated as, or intended to be, a corollary to the diverse citizenship jurisdiction clause of the Constitution. Merely because diversity of citizenship as a basis of jurisdiction may have been abused through the medium of this parasitic doctrine does not, it seems to me, justify abolishing this jurisdictional basis itself. In order to destroy the parasite it is not necessary to kill that to which it has attached itself; the two are not inseparable. It would be far preferable for Congress to abolish the obnoxious doctrine rather than the constitutional policy of diversity of citizenship jurisdiction which the doctrine is abusing. Aside from the merits of the proposal, however, I believe there is considerable doubt with respect to the constitutionality of this proposed legislation.

As I have already pointed out, the Constitution provides that:

> "The judicial power shall extend . . . to controversies . . . between citizens of different states."

It is true that the Constitution does not purport to define the limits or the scope of diversity of citizenship jurisdiction. These are matters which apparently were left to Congress to legislate upon from time to time. And we have seen that Congress has, on various occasions, passed legislation with reference to the circumstances under which this type of federal jurisdiction may be invoked. Never, however, has Congress undertaken to abolish diversity of citizenship as a basis of federal jurisdiction, such as the bill now pending proposes to do. The effect of such an abolition would be nothing short of a nullification of the provisions of the Constitution which direct that the judicial power shall extend to controversies between citizens of different states. I think it is by no means certain that such a power of constitutional nullification is vested in Congress. It seems to me that this constitutional provision expresses a policy with reference to judicial power that cannot be abrogated except by constitutional amendment. If this be not so, then it would appear that Congress has the power to deprive federal district courts of all jurisdiction whatsoever. Surely it is questionable whether such power is vested in Congress so long as the inferior courts which it has created pursuant to constitutional authority remain in existence. While Congress no doubt has authority to prescribe the conditions upon which this judicial power in diversity of citizenship cases may be exercised, yet it appears to me very doubtful whether Congress is vested with authority to nullify and disregard this judicial power altogether, such as it would be doing by abolishing diversity of citizenship as a basis of federal jurisdiction, for

the reason that the power is of constitutional origin.

III

Right of Federal Judges To Comment Upon the Evidence and the Credibility of Witnesses in Cases Where a Jury Has Been Impanelled To Try the Issues of Fact

The third bill provides that in any cause pending in any United States court triable by jury it will be a reversible error for the presiding judge in the case to express his personal opinion as to the credibility of the witnesses or the weight of the testimony involved in the issue, and thereby proposes to deprive Federal Judges of their present right to comment upon the evidence and the credibility of witnesses in cases where a jury has been impanelled to try the issues of fact. Ever since the creation of our national judiciary system the Federal courts have followed the rule of allowing the judge to comment upon the evidence and to advise the jury concerning the facts, so long as he makes it clear to the jurors that his comments and advice are not binding upon them, and that they, in the final analysis, are the triers of the facts. The rule was clearly stated by Mr. Justice Gray, almost half a century ago, when, delivering an opinion in the United States Supreme Court, in the *Vicksburg* case, he said:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. *Carver* v. *Jackson*, 4 Pet. 1, 80 (29 U. S. bk. 7, L. ed. 761, 789); *Magniac* v. *Thompson*, 7 Pet. 348, 390 (32 U. S. bk. 8, L. ed. 709, 723); *Mitchell* v. *Harmony*, 13 How. 115, 131 (54 U. S. bk. 14, L. ed. 75, 82); *Transportation Line* v. *Hope*, 95 U. S. 297, 302 (Bk. 24, L. ed. 477, 479); Taylor, Ev. 8th ed., Sec. 25."

This rule was an essential feature of trial by jury at common law. One of the arguments most seriously advanced by those who deny the wisdom of such rule is that when a judge is given and exercises such a right, the tendency is for him to dominate the jury to such an extent that it becomes merely the mouthpiece of the court. This objection is ill-founded and will not stand the test of careful analysis.

In the first place it is based upon a misconception of the manner in which the common law permitted—and the rule in the Federal courts today permits—the trial judge to exercise this power. This rule provides that the trial judge may not lawfully use this power to dictate to the jury what shall be their conclusion from the evidence, but only as a means of assisting and guiding the jury in their endeavor to arrive at a proper determination of the facts, and that he must make it clear to the jury that, notwithstanding his comments upon the testimony, they are to exercise their own discretion and draw their own conclusions from the evidence. It is a discretionary power which is to be exercised only when the judge deems it advisable or necessary as a means of clarifying the issues and the evidence, and making it more intelligible to the jurors. If a judge fails clearly to inform the jury of the weight to be attached to his comments on the evidence, counsel have ample opportunity to call the matter to the attention of the court, so that, if necessary, correction may be made before the jury retires. If the comments of the judge are deemed prejudicial error, reversal by an appellate court provides adequate relief. It is said by some that a statement by the judge to the effect that his comments to the jury are to be disregarded if they do not agree with him is unavailing. If jurors have the capacity and intelligence, as our jury system presumes they have, to qualify as the ultimate triers of the facts, notwithstanding the complexity of the evidence and their lack of training and experience in evaluating the same; and if they can be trusted, as they are, to give a just consideration to the testimony, notwithstanding frequent emotional, personal and partisan appeals by counsel on one side or the other, then surely they must have the ability to comprehend a statement from the judge to the effect that his comments on the facts are not intended to deprive them of the exercise of an independent judgment concerning the same.

For over 140 years Federal judges have exercised this power to comment upon the evidence, and yet today we hear of no serious or well founded complaint that they dominate the jury. On the contrary, almost a century and a half of experience justifies the belief that in the main the power is exercised not to dominate but to aid the jury; not as a weapon of coercion, but as a method of assistance. If the power is repeatedly abused and used oppressively, there is the remedy of removal. If the power is exercised improperly there is the remedy of reversal.

In the second place this objection questions the intelligence and independence of the average American juror. There is, it seems to me, no particular reason for believing that jurors will allow a judge to force upon them opinions that are at variance with their own sound judgment on the facts of the case. They do not generally act against what they believe to be right and just. The jury system is based upon the premise that jurors are men of intelligence. Some 75 years ago, Chief Justice Taney of the United States Supreme Court, in the course of delivering an opinion of the Court, said:

"The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this court in the case of *McLanahan* v. *The Universal Insurance Company*, 1 Pet 182, and *Games* v. *Stiles*, 14 Pet. 322. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury, for an objection of that kind questions their intelligence and independence; questions which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it in questions of fact."

It is my belief that the average American citizen would resent the idea that, in order for him to exercise an independent and intelligent judgment as a juror, it is necessary to "muzzle" the judge. The average juror will lend a ready and willing ear to impartial suggestions and comments that fall from the lips of the trial court. In the first place, most jurors realize the limitations of their own training and experience in the matter of assimilating and evaluating the evidence. In the second place, they realize that the presiding judge, because of his training and experience, and indeed

because of the very nature of his position, is able to materially assist them in this matter. The jurors need help in their business of untangling the mass of testimony and the presiding judge is the only expert at the trial who is in a position to render this help in a fair and impartial manner. In the third place, this objection seriously questions the ability and competency of our judges to exercise this power fairly and impartially. It is no doubt true that the performance of this task by a judge is a difficult one because the power to comment upon the evidence must be wisely and carefully used. Men who are appointed to the Federal bench are presumed to possess the ability to perform this highly important role of "keyman" in our system of trial by jury. That the great majority of Federal judges do possess this ability cannot, I think, well be denied. We cannot hope to make the administration of justice more prompt and effective unless we surround the judge with an atmosphere of freedom calculated to permit him to play a constituent part at the trial of the case. Not long ago the Honorable President of this Association, in speaking on this subject, said:

"Give the judge all the power he has, and more, too. Of course, you must have able conscientious men on the bench; but you will not get better judges by curtailing their functions and making them mere moderators of juries."

If the judge is competent to direct a verdict or to grant a new trial on the ground that the verdict is against the evidence, as he is presumed to be, then he is competent to comment on the facts in the first instance, to the end that erroneous and unfair verdicts by the jury may be avoided. If he is competent to act as a trier of facts in an equity case, as he is presumed to be, then he is competent to merely aid the triers of the facts in a jury case. It seems to me that the objection directed toward the competency of the judge to fairly exercise the power to comment upon the evidence, is devoid of any real merit.

There is another reason underlying much of the opposition to allowing Federal judges to comment upon the evidence. I refer to the desire, seldom openly expressed, but nevertheless actively present, on the part of some lawyers to have the presentation of the case to the jury more in their control and less in the control of the judge than it is under the conditions now existing in the Federal courts. It is a desire born of the conception which some members of the bar seem to have, of the manner in which a trial by jury should be conducted,—a conviction whose major premise is that the lawyer's personality rather than that of the judge should be dominant at the trial, and that the lawyer, untrammelled by the remarks of a nonpartisan judge, should be free to appeal to the emotions, prejudices and weaknesses of the jury with the full force of his personality, his skill and his experience. Learning and ability of counsel are elements which have, rightly, a place in our system of trial by jury. Such features should, however, not be the dominating influence in the courtroom. Our system of trial by jury is based upon the premise that the presiding judge is an impartial representative of the public. He is not there to represent either of the litigants. His function is to see that justice is administered as between the parties in as prompt and efficient a manner as is possible. The lawyer, on the other hand, represents a particular litigant; his primary business is to present his client's case in the most favorable manner that he can. His interest is of necessity somewhat partisan. If trial by jury is intended merely as a game of sport, wherein the issues are to be decided largely by the difference between the skill, resource and experience of the respective lawyers, then the lawyer should be the dominant personality at the trial, but if trial by jury is intended, as I think it is, to be something more than a sporting contest, and is devised, and intended to be used, as a means of fairly and equitably adjusting the differences between the parties in accordance with the facts of the case, then surely the judge should be the dominant personality of the trial, not only because his function is to see that justice is administered, but also because he is the only disinterested and impartial expert at the trial. The judge must be surrounded with an atmosphere of freedom that is conducive to the performance of the function he is intended to perform. Those who seek to "muzzle" the Federal judges know that if the power to comment on the evidence and to assist the jury in factual matters is taken away from the judge, then gradually the personality of the trial lawyer will project itself further and further into the picture, while that of the judge will shrink to a position of comparative oblivion. In his annual address, as President of the American Bar Association, in 1916, Mr. Elihu Root used the following unequivocal language in speaking on the matter:

"The restiveness of the bar under the control of the judge on the bench finds its expression very widely in *our legislation regarding procedure. That legislation is, of course, framed by the lawyers in our legislatures, and unconsciously,* doubtless, their natural attitude of antagonism has led to a great multitude of provisions designed to protect the bar against interference from the bench. The most striking illustration of this tendency is presented by the provisions found in many states, and quite recently urged upon Congress, *prohibiting the judge from expressing any opinion to the jury upon questions of fact.* From time immemorial, it has been the duty of the court to instruct the juries as to the law, *and advise them as to the facts.* Why is it that by express statutory provision the only advice, the only clarifying opinion and explanation regarding the facts which stands any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make it certain that the individual advantage gained by having the more skillful lawyer shall not be taken away. *It represents the individual's right to win, and negative the public right to have justice done.* It is to make litigation *a mere sporting contest* between lawyers, and to *prevent the referee from interfering in the game. . . .*"

If trial by jury in the Federal courts is to remain the venerable common law institution it has been for so many years, then the presiding judge must retain the opportunity to play a constituent part therein. Aside from the merits of the proposal, I am indeed doubtful of its constitutionality.

I have already referred to the fact that the right of the trial judge to advise a jury concerning the evidence is an essential feature of trial by jury at common law. The late James B. Thayer, in his treatise on evidence, said:

"It is not too much to say of any period in all English history that it is impossible to conceive of trial by jury as existing in a form *which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury in such form as that is not a trial by jury in any historical sense of the word.* It is not the venerated institution

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DEPARTMENT OF CURRENT LEGISLATION

The Legislatures Expand the Group Insurance Field

By Sterling Pierson

A SURVEY of recent insurance legislation reveals further legislative recognition of a comparatively recent addition to the life insurance family, namely, group life insurance. Statutes relating to this type of insurance have been enacted in seven states this year. Of these the New York law[1] probably represents the most interesting innovation, for it authorizes life insurance coverage on the group plan for all persons who become borrowers from one financial institution, or "who become purchasers of securities, merchandise or other property from one vendor under agreement to repay the sum borrowed or to pay the balance of the price of the securities, merchandise or other property purchased in installments over a period of not more than ten years." The amount of such insurance, which is not to exceed $10,000 on any one life, is to be measured by the extent of the indebtedness to the lender or vendor of the persons insured. The insurance is to be written under a policy issued upon the application of and is to be payable to the financial institution or vendor "or other creditor to whom such vendor may have transferred title to the indebtedness," and the premium is to be payable by the financial institution, vendor or other creditor.

That portion of the statute which relates to insurance on borrowers is intended to meet the needs of banks and other financial institutions making loans. A number of banks which have engaged in the business of making personal loans have found it desirable to insure the lives of the borrowers in order to eliminate the necessity for attempting to collect from the borrowers' families when they died before completing repayment of their loans. Heretofore it has been necessary in New York that individual insurance be issued on the life of each borrower in such cases. As the loans are usually of small amounts and of short duration the banks have regarded individual insurance as being unduly expensive. It is expected that the new law will enable lenders to obtain the same protection at less cost. The extension of group coverage to installment purchasers is an experiment which will be watched with interest, as it may prove to be an important factor in stimulating the future development of installment sales. It is interesting to note that while group insurance has previously been used for the exclusive protection of individuals and their families and not of their creditors[2] this amendment makes it available to creditors as a kind of credit insurance.

The New York law also attempts to meet another problem arising out of the complexity of modern industrial conditions by providing that where a group policy is issued to an employer covering the lives of his or its employees there may be inserted in the policy a provision to the effect that the term "employees" as used therein shall include "the officers, managers and employees of subsidiary or affiliated corporations and the individual proprietors, partners and employees of affiliated individuals and firms, when the business of such subsidiary or affiliated corporations, firms or individuals is controlled by the common employer through stock ownership, contract or otherwise." The purpose of this provision is to enable a holding company which controls numerous commercial enterprises to cover under a single policy its own employees and also the employees of the subsidiaries and affiliated corporations, partnerships and individuals.

The legislatures of other states have dealt with different group insurance problems. California[3] authorizes group coverage for members "of any association of employees of the United States, of the state, county, or municipal governments, employees of school districts (including teachers), irrigation districts, or other political subdivisions of government." Colorado,[4] which heretofore has authorized group coverage only for employees of an employer, now provides that the term "employer" shall be construed "to include counties, cities, cities and counties, incorporated towns, school districts, and other political subdivisions of this state," and authorizes such subdivisions, in order to promote the better efficiency of their employees, to insure their lives under policies of group life, health or accident insurance, and to pay the premiums therefor out of the corporate revenues. In Iowa[5] group policies may now be issued covering the members of any labor union or teachers association, insuring only such members as are actively engaged in the same occupation or profession. Where, however, the policy is renewable annually at the option of both parties to the contract, and the basis of the premium rates may be changed at the option of the insurer at the beginning of any policy year, "all members of a trade union or teachers association may be insured." Massachusetts[6] formerly prohibited the coverage under policies issued to trade unions of members who were not actively engaged in their occupation, but this restriction has been removed. A Pennsylvania statute[7] enacted at the 1929 session clari-

1. Laws of 1929 c 292.
2. The standard group insurance laws which are hereinafter referred to provide that "no policy of group insurance, nor the proceeds thereof, when paid to any employee or employees thereunder, shall be liable to attachment, garnishment, or other process, or to seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such employee, or his beneficiary, or any other person who may have a right thereunder, either before or after payment; nor shall the proceeds thereof, when not made payable to a named beneficiary, constitute a part of the estate of the employee for the payment of his debts."
3. S.B. No. 193, approved May 8, 1929.
4. S.B. No. 231, approved April 19, 1929.
5. S.B. No. 418, approved April 5, 1929.
6. Laws of 1929 c 121.
7. S.B. No. 434.

fies the status of group insurance in the Commonwealth by authorizing group coverage for (a) employees of one employer, (b) members of the national guard or naval militia of any state, (c) members of the state troopers or state police of any state, and (d) members of a labor union actively engaged in the occupation which qualifies them for membership in the union. Washington[8] provides that "Life insurance covering the members of a labor union written under a policy issued to such labor union is hereby declared to be group insurance and such labor union shall be deemed to be an employer and the members thereof shall be deemed to be employees within the meaning of this act." In order to appreciate the significance of this legislation it is necessary to look back over the past to survey the previous developments which have taken place in the field of group insurance and the problems which have arisen therefrom.

First of all the reader will probably wish to know what group insurance is. It has been briefly defined as "a plan for insuring a number of lives under one general or blanket contract."[9] Where such insurance is applied for, one policy is issued, setting forth the conditions governing the insurance upon all the individuals to be covered and the benefits which they are to receive. In addition individual certificates, which do not constitute a part of the insurance company's contract, are issued to the persons insured in order to advise them of the general nature of their protection. A single premium, which is usually payable monthly, is collected for all the insurance in force under the policy. Most of this insurance is written on the yearly renewable term plan and as the premiums charged reflect economies in administration, they are usually lower than individual insurance premiums. Ordinarily the insurance is granted without medical examination. Inasmuch as group life insurance is simply a modified form of "life insurance" no statutory authorization was required to enable life insurance companies to write this type of insurance so long as they observed the same limitations which applied to their ordinary business. The need for legislation arose only when group insurance was issued without medical examination and at premium rates lower than those charged for individual term insurance. In the earliest stages of its development the companies were more or less free to write "group insurance" on any aggregation of lives, but as the volume of such insurance written became substantial the supervising insurance officials began to consider the desirability of restricting the fields to which it might be applied.

By 1912 it had become apparent that group insurance was a permanent entrant into the life insurance field. At the end of 1912 group insurance amounting to $13,000,000 was in force upon the lives of 11,450 individuals. Soon afterwards the legislatures began to mould its future development. Some of the statutes resulting from this legislative activity attempted to legalize the issuance of group insurance without medical examination,[10] while others were intended to permit the issuance of such insurance at rates lower than those charged for individual insurance.[11] In several jurisdictions rulings of the Attorney-General or of the Insurance Department rendered such legislation unnecessary.[12] Where legislation was required, however, the legislators were confronted with the very difficult problem of determining what classes of insurance should be permitted to be written as "group insurance." They found a wide divergence of opinion and practice among the companies. One of the first group insurance policies issued covered the lives of seven hundred Chinese coolies who were to be transported from China to Panama. The insurance, which was taken out by the shipper who was to transport them, was for $15 on each coolie, but was later changed to $14 7/12 so that twenty additional coolies might be included without increasing the total amount of the risk. Subsequently group insurance coverage was applied to less extraordinary cases, and by 1912 the underwriters had come to regard the insuring of employees of one employer as the proper sphere of influence for group insurance. Accordingly we find that the most common definition of group insurance appearing in this early legislation was that form of insurance issued under "policies insuring employees of any employer who through their secretary or employer take out insurance in groups of not less than one hundred lives and pay their premiums through such secretary or employer."[13] Some of the statutes authorized group insurance on "members of organizations"[14] or "members of labor organizations, societies or similar organizations,"[15] and some of them permitted coverage on a minimum of fifty lives.[16] This legislation was restrictive in character and did not purport to grant to the companies authority to write a new type of business.

As such legislation was enacted in comparatively few jurisdictions, it did not operate to prevent effectively the extension of group coverage to other classes of risks. The tendency of the companies to extend such coverage to other types of groups eventually led to further restrictive legislation. At a meeting of the National Convention of Insurance Commissioners held in August, 1917, two papers were read on the subject of group insurance[17] which in the five years period since 1912 had increased in total volume to $250,000,000, and was in force upon 325,000 lives. The discussions which ensued dealt principally with the question whether the practices of the various companies

8. Laws of 1929 c 129.

9. See "Group Insurance," a paper read by William J. Graham before the Actuarial Society of America and reported in the 1916 Proceedings of the Society at Page 263. A discussion of this paper will be found in the 1917 Proceedings of the Society at Page 132. See also "Group Insurance," by Ralph B. Trousdale, March, 1917, Annals of The Academy of Political and Social Science.

10. Arizona, Session Laws 1913 c 94; Idaho, Laws 1913 c 185, and see also c 97; see also Mass. Ins. Laws, Sect. 123.

11. Florida, Acts 1915 c 6849; Maine, Laws 1913 c 84; Minn. Gen. Stats. 1913, Sect. 3617; Nebraska, Insurance Pamphlet 1913, Page 85; N. J. Insurance Pamphlet 1916, Page 84; West Virginia, Acts of 1913. In New York the definition came in the form of a provision excepting group insurance from the usual restrictions on the amount of new business written. See Laws of 1916 c 360.

12. The Attorney-General of Texas ruled that a policy might be issued on a group without medical examination of the individuals comprising it and that such insurance might be continued after members had ceased to belong to the group, without violating the discrimination statutes of the State. See Opinion of the Attorney-General dated June 30, 1915. In Utah the Insurance Department issued a ruling dated July 10, 1913, requiring that all proposals for group insurance be submitted to it for approval, and stating that each individual case would be decided on its merits. See also a Ruling by the Ohio Insurance Department dated March 1, 1917.

13. See Arizona and Maine laws cited, *supra*, notes 10 and 11.

14. See West Virginia law cited, *supra*, note 11.

15. See Nebraska and New Jersey laws cited, *supra*, note 11.

16. See Florida and Maine laws cited, *supra*, note 11.

17. Proceedings of National Convention of Insurance Commissioners 1917, Paper entitled "New Features in Life Contracts" by M. J. Cleary and Paper entitled "Life Insurance in Groups, 1912-1917" by H. Pierson Hammond.

were consistent with sound underwriting. As a result of this discussion the Convention adopted a resolution calling for the appointment of a Committee to make an investigation and report "such standards or bases for conducting the business of Group Life Insurance as are, in their judgment, necessary for its independent operation." The Committee was duly appointed, and in collaboration with a committee of actuaries representing the insurance companies, investigated the subject assigned to it. At a meeting of the Convention held in December 1917[18] the Committee presented a report recommending the adoption of the following definition:

"Group life insurance is that form of life insurance covering not less than fifty employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer or by the employer and employees jointly, and insuring only all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; provided, however, that when the premium is to be paid by the employer and employee jointly and the benefits of the policy are offered to all eligible employees not less than seventy-five per cent. of such employes may be so insured."

It also recommended the adoption by each state of certain standard provisions for group insurance policies, the most important of which required the insertion in individual certificates issued to employees of a provision "to the effect that in case of the termination of the employment for any reason whatsoever the employee shall be entitled to have issued to him by the company, without further medical examination and upon application made within thirty-one days after such termination, and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of life insurance in any one of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under such group insurance policy at the time of such termination." It further recommended that the proceeds of policies of group life insurance should not be subject to the indebtedness of employees for whose benefit such policies were procured. It is worthy of note that the Committee suggested that the two latter recommendations might be carried out either by statutory provision *"or by way of departmental regulation."*

The report was duly adopted, and in 1918 New York[19] and Massachusetts[20] enacted statutes carrying out the recommendations of the Convention Committee. The next year Connecticut[21] authorized the issuance of policies "upon the group plan, with special rates of premiums less than the usual rates of premiums for such policies," without attempting to restrict the types of groups to which such insurance might be issued. In order that the future development of group insurance might be given special consideration, this law also required the companies to state separately in their annual statements the number of group policies issued, the amount of such insurance in force, the reserves for such insurance, the premiums and payments to policyholders thereunder, and the bases of valuation used for such insurance. Iowa[22] substantially followed the recommendations of the Convention Committee, but thought it necessary expressly to grant to life insurance companies the power to do group business and to exempt group insurance from the medical examination requirements in force in that State. Colorado[23] modified the standard law to the extent of permitting the coverage of less than fifty employees when a medical examination was required, and also adopting provisions similar to those of the Connecticut law. In 1921 Indiana[24] adopted the standard group law, and at the same session also enacted a statute similar to that of Connecticut already referred to. The group law expressly provided that the individual certificates issued to employees should not become a part of the contract between the parties. Massachusetts[25] amended its group law to provide that the classes of employees to be insured under a group policy might be determined "by duration of service in which case no employee shall be excluded if he has been for one year or more in the employ of the person taking out the policy." This amendment was necessary in order to correct the situation created by the Insurance Commissioner's ruling that length of service was not a "condition pertaining to the employment" within the meaning of the provisions of the standard law. This meant that employers could not require their employees to serve a waiting period before obtaining the benefits of group insurance.

California[26] in 1923 followed the course previously pursued by Connecticut. The following year[27] the New York definition of group insurance was extended to include insurance covering "the members of one or more companies, batteries, troops or other units of the national guard of any state." A year later North Carolina[28] adopted the standard law and Michigan[29] enacted a group law patterned upon the standard law from which it varied in two details. It permitted the insuring of a minimum of twenty-five lives and provided for coverage of members of units of the national guard of any state. The New York statute defining group insurance was again amended in 1925[30] to provide for group insurance on the lives of members of one or more troops or other units of the state troopers or state police of any state. In the same statute an important step in the promotion of group insurance was taken by adding to the definition "insurance covering the members of any labor union, written under a policy issued to such union, which shall be deemed to be the employer for the purposes of this chapter, the premium on which is to be paid by the union or the union and its members jointly, and insuring only all of its members who are actively engaged in the same occupation." Certain members of organized labor had been critical of employer-employee group insurance, principally because of the fact that it tended to "tie a man to his job" regardless of the unsatisfactory conditions of his employment. This

18. See Proceedings of National Convention of Insurance Commissioners 1918, Pages 27, 28 and 29.
19. Laws 1918 c 192.
20. Laws 1918 c 112.
21. Public Acts 1919 c 138.
22. Acts 1919 c 197.
23. Laws 1919 p. 441.
24. Acts 1921 p. 320.
25. Laws 1921 c 141.
26. Stats. 1923 p. 724.
27. Laws 1924 c 549.
28. Public Laws 1925 c 58.
29. H.B. No. 47, approved May 28, 1925.
30. Laws 1925 c 523.

amendment, by making it possible for the union member to retain his group insurance even when he severed his connection with a particular employer, removed the basis of this criticism. Organized labor has since become an enthusiastic advocate of group insurance, and now has an insurance company of its own, the principal portion of whose business is on the group plan. In operating under this amendment the companies have met two problems. The first has arisen out of the construction placed by the Insurance Department upon that portion of the amendment restricting coverage to such members of a labor union as are "actively engaged in the same occupation." The Department construed this clause as forbidding the coverage of persons who at the time of applying for the insurance were not actively engaged in the occupation qualifying them for membership in the union, and the continuance of coverage upon the life of a member who, after his insurance became effective, ceased to follow his occupation but retained his membership in the union.[31] In actual practice it has been found that most of the unions desire coverage for both classes of persons, and it was in order to meet their wishes that the Massachusetts[32] and New York[33] laws were amended to permit such insurance. The second difficulty has been that of determining what classes of organizations are to be considered as "labor unions" within the meaning of the statute. This problem remains unsolved in New York, but the 1929 statutes referred to in the earlier portion of this note have attempted to meet it by elaborating classes of employees associations to which group insurance may be issued even where they do not technically qualify as "labor unions."

By 1926 the competition for group insurance had grown so keen and the volume of such insurance in force was increasing so rapidly[34] that the Superintendent of Insurance in New York found it advisable to recommend to the legislature the enactment of legislation providing for minimum group insurance rates. This resulted in a statute[35] forbidding the companies to issue policies of group life insurance for premiums "less than the net premium based on the American Men Ultimate Table of Mortality, with interest at three and one-half per centum per annum, plus a loading, the formula for the computation of which shall be determined by the superintendent of insurance." This statute purported to control the writing of business not only in New York but also business written outside of that state by foreign companies admitted to do business there.[36] It was noteworthy principally because of this and of the fact that it subjected group insurance rates to administrative rather than legislative control. The same year a statute modelled after those enacted in other jurisdictions between 1913 and 1917 was adopted by New Hampshire.[37] In 1927 California,[38] New Jersey[39] and Washington[40] adopted statutes containing provisions similar to those of the standard law. The first two acts also permitted group coverage for labor unions. The Washington law provided for a minimum of twenty-five lives instead of fifty, and contained a minimum rate provision similar to the 1926 New York statute. The following year Massachusetts[41] authorized group insurance coverage for members of trade unions "and other associations whose principal objects are to deal with the relations between employers and employees relative to wages, hours of labor and other conditions of employment."

Group insurance for employees of states and municipalities has created a special problem for legislative consideration, because of the uncertainty which has existed in some jurisdictions as to the propriety of using public funds for the purpose of paying the premiums on such insurance. This question has been the subject of extensive controversy and litigation which on the whole has resulted favorably[42], but in recent years there has been a growing demand for a legislative answer. Some of this legislation[43] has taken the form of the 1929 Colorado statute expressly authorizing the use of public revenue for this purpose. Such legislation, when adopted in states which have no group laws, furnishes an interesting illustration of an implied sanction of group insurance.[44] In other states, where constitutional limitations presumably prevent such action, the most the legislatures have been able to do for state and municipal employees has been to authorize the issuance of group insurance to associations of such employees, who must pay their own premiums.[45] South Carolina attempted an alternative solution by providing that the name of any department of the State Government might be used to obtain group insurance, but without expense to the State.[46]

From the foregoing summary it is apparent that the legislative tendency in recent years has been in the direction of expanding the fields to which group insurance may be applied. Each step in that direction has produced increasing demands for further expansion, and it seems likely that such demands will recur. Serious consideration may well be given to the question whether the legislatures should continue to deal with the future development of group insurance, or whether it would be in the best interest of the insurance business for them to give to the supervising insurance officials of their respective states the authority to determine whether group insurance coverage may properly be extended to new classes of groups. The problems involved in such a determination are technical in nature and fall within the sphere of the technical men attached to insurance department staffs. As we have seen the insurance departments

31. See Ruling of the New York Insurance Department dated June 9, 1926.
32. Laws 1929 c 121.
33. Laws 1929 c 292. In order that the labor union may be fully advised as to the probable effect of such action upon the premium rates the New York law requires the companies to insert in policies covering all members of a labor union a notice to the effect that "the annual renewable term premium depends upon the attained ages of the members in the group and increases with advancing ages."
34. The total volume of group insurance in force at December 31, 1925, amounted to $4,299,000,000.
35. Laws 1926 c 129.
36. The legislature attempted to accomplish this by providing that "A foreign life insurance company which shall not conduct its business in accordance with this requirement shall not be permitted to do business in this state."
37. Laws 1926 c 273.
38. Stats.1927 c 657.
39. Laws 1927 c 53.
40. Laws 1927 c 300.
41. Laws 1928 c 244.
42. See *Mohl v. City of Albuquerque*, 199 Pac. 373; *Bowers v. City of Albuquerque*, 200 Pac. 421; *State of Tennessee v. City of Memphis, Board of Water Commissioners*, 251 S. W. 46; *People v. Powell*, 231 N. Y. 593.
43. See Tennessee, Private Acts 1921 c 193, s. 50; Louisiana, Laws 1926 Act 104; Illinois 1927 Stats. c 24, s. 868.
44. *idem.*
45. See California, 1929 S.B. No. 193.
46. Laws 1928 c 712.

of several states have been authorized to regulate the rates for such insurance. Many of them now pass upon the policy forms issued in connection with group insurance. Time may prove the desirability of also giving them the additional power which is now suggested. Such action would relieve the legislators of the future of what appears likely to be an increasing burden.

ARRANGEMENTS FOR MEMPHIS MEETING

TO be held at Memphis, Tennessee, October 23, 24, 25, 1929. HEADQUARTERS: Hotel Peabody, Union Avenue and Second Street. Rates: Single rooms (one person) $4 to $7 per day; double rooms with double bed (two persons) $6 to $8 per day; double rooms with twin beds (two persons) $7 to $10 per day. All rooms have tub and shower bath and outside location.

Reservations and Hotel Information

Requests for reservations and information concerning the Peabody and other Memphis hotels should be addressed to the Executive Secretary, Olive G. Ricker, 209 South La Salle Street, Chicago, Illinois.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations stating (1) First and second choice of hotel (2) whether double or single room is wanted and if double the names of persons who will occupy it; (3) whether double or twin beds are preferred; (4) the approximate rate; (5) date of arrival, including definite information as to whether such arrival will be in the morning or evening.

Every effort will be made to comply with requests made, as far as available accommodations will permit. Reservations should be made as early as possible.

Railroad Transportation

Individual identification certificates will be sent, on request to the Executive Secretary, to all members of the Association who expect to attend the Annual Meeting, enabling them to secure a round-trip ticket at fare and one-half, return limit Oct. 31, or round-trip ticket good for thirty days at fare and three-fifths.

National Conference of Commissioners on Uniform State Laws

The Conference will be held in Memphis on October 14-19, with the Peabody Hotel as headquarters.

Reservations of hotel rooms should be made through Mrs. Olive G. Ricker, Executive Secretary of the American Bar Association, 209 South La Salle Street, Chicago, Illinois.

The tentative program of this Conference appears in this issue.

ADDITIONAL HOTEL ACCOMMODATIONS

HOTEL	Distance from Headquarters	Single	2 Persons—Double Bed	2 Persons—Twin Beds	Without Bath Single	Without Bath Double
Adler	3 Blocks	$2.00 to $2.50	$3.50 to $4.00	$4.00	$1.50	$2.50
Ambassador	5 Blocks	$2.00	3.50 to 4.00	4.00	1.50	$2.50 to $3.00
Catholic Club (for men)	5 Blocks				150 (Shower bath available)	$2.50
Chisca	3 Blocks	$2.50 to $5.00	4.50 to 5.50	$5.00 to $6.00	$2.00 to $2.50	$3.00 to $4.00
Claridge	6 Blocks	3.00 to 4.00	4.50 to 6.00	6.00 to 7.00		
Elk's (for men and women)	5 Blocks	2.00 to 3.50	4.00 to 6.00			
Gayoso	3 Blocks	250 to 5.00	4.50 to 7.50	5.00 to 7.50	2.00 to 2.50	3.50 to 4.00
Hermitage (for men)	1 Block		$3.00	$4.00	$1.00	
Tennessee	Across Street	2.00 to 3.00	$3.50 to $5.00	$5.00 to $6.00		
Forrest Park Apartments	1 Mile	Parlor, Bedroom, Bath and Kitchenette $4.00 to $6.00.				
Parkview Apartments	3 Miles	Parlor, Bedroom, Bath and Kitchenette $8.00 to $10.00. Parlor, Bedroom and Bath, Single $4.00, Double $6.00. Regular Hotel Reservations, $3.50 Single and $5.00 Double.				

TENTATIVE SCHEDULE OF SECTION AND OTHER MEETINGS AT MEMPHIS

Monday, October 14 to Saturday, October 19 Inclusive

National Conference of Commissioners on Uniform State Laws—Two sessions daily, 10:00 A. M. and 2:00 P. M. except Saturday, Oct. 19th, when only a morning session will be held.

Monday, October 21

Morning

Conference of Bar Association Delegates.
National Association of Attorneys General.
National Association of Referees in Bankruptcy.

Afternoon

Conference of Bar Association Delegates.
Section of Public Utility Law.
American Legislators' Association.
National Association of Attorneys General
National Association of Referees in Bankruptcy.

Evening

Dinners: Conference of Bar Association Delegates. American Judicature Society.

Tuesday, October 22

Morning

Section of Criminal Law and Criminology.
Judicial Section.
Section of Legal Education and Admissions to the Bar.
Section of Mineral Law.
Section of Patent Trademark and Copyright Law.
Section of Public Utility Law.
National Association of Attorneys General.
National Association of Referees in Bankruptcy.

Afternoon

Comparative Law Bureau.
Section of Criminal Law and Criminology.
Judicial Section.
Section of Legal Education and Admissions to the Bar.
Section of Mineral Law
Section of Patent Trademark and Copyright Law.
National Association of Attorneys General.
National Association of Referees in Bankruptcy.

Dinners: *Evening*

Judicial Section.
Section of Mineral Law.
Section of Patent Trademark and Copyright Law.
Section of Public Utility Law.

Detailed programs and other information with reference to the meetings referred to above will appear in later issues.

Tentative Program of National Conference of Commissioners on Uniform State Laws, Peabody Hotel, Memphis, Tenn., Oct. 14-19, 1929

Meeting of Executive Committee, Monday, October 14, 1929, at 9 o'clock.

First Session of Conference, Monday, October 14, at 11 o'clock.

1. Roll call.
2. Address of Welcome.
3. Response.
4. Reading of Minutes of Last Meeting.
5. Report of Treasurer.
6. Report of Secretary.
7. Report of Executive Committee.
8. Appointment of Committee on Memorials.
9. Announcement of Committee on Nominations.
10. Report of Standing Committees:
    (a) Scope and Program.
    (b) Legislative.
    (c) Public Information.
    (d) Appointment and Attendance by Commissioners.
11. Report of General Committees:
    (a) Legislative Drafting.
    (b) Uniformity of Judicial Decisions.
    (c) Cooperation with Other Organizations Interested in Uniform States Laws.
12. Report of Special Committees:
    (a) Committee on Obsolete Acts.
    (b) Revision of Constitution and By-Laws.
    (c) Aeronautics.

(Adjourn at 12:30 to convene again at 2 o'clock.)

Monday, October 14, at 2 o'clock.

1. Consideration of Report of Committee on Scope and Program.
2. Consideration of Report of Committee on Aeronautics.

Tuesday Morning, October 15, at 10 o'clock.

1. Consideration of Fourth Tentative Draft of the Mechanics' Lien Act.

Tuesday Afternoon, October 15, at 2 o'clock.

1. Consideration of second draft of Uniform Income Apportionment Act.
2. Consideration of second draft of Uniform Acknowledgments Act.

Wednesday Morning, October 16, at 10 o'clock.

1. Consideration of Acts reported by Social Welfare Acts Section.

Wednesday Afternoon, October 16, at 2 o'clock.

1. Consideration of Acts reported by Social Welfare Acts Section.

Wednesday Evening, October 16, at 8 o'clock.

1. Consideration of Acts reported by Social Welfare Acts Section.

Thursday Morning, October 17, at 10 o'clock.

Consideration of Acts reported by the Commercial Acts Section.

Thursday Afternoon, October 17, at 2 o'clock.

1. Consideration of Acts reported by Commercial Acts Section.

Thursday Afternoon, October 17, at 4 o'clock.

1. Consideration of Report of Committee on Memorials.

Friday Morning, October 18, at 9 o'clock.

1. Consideration of Acts reported by Commercial Acts Section.

Friday Afternoon, October 18, at 2 o'clock.

1. Consideration of Acts reported by Civil Procedure Acts Section.

Saturday Morning, October 19, at 10 o'clock.

1. Consideration of Acts reported by Public Law Section.
2. Consideration of Firearms Act.

VIEWS IN ASSOCIATION'S CONVENTION CITY

(1) Shelby County Court House at Memphis, Tennessee, one of the most beautiful structures in the country devoted to the administration of Justice. (2) Looking east on Madison Avenue, in the heart of the financial district of Memphis. (3) Statue of the Doughboy in Overton Park, erected as a memorial to the boys of Memphis and Shelby County who laid down their lives in the World War.

THE PRELIMINARY HEARING

Provisions of Proposed Code of Criminal Procedure of American Law Institute Bearing on This Subject—A Word of Caution as to Attitude Towards Proposals—Improvement of Administration of Justice Should Be Prime Consideration

By Justin Miller*
Member of Committee of Advisers for Code

ONE of the contrasts between civil and criminal procedure is the insistence in the latter case upon a more formal observance of the rights of the defendant prior to the filing of the first pleading in the trial court. All that is required generally to initiate a civil action, even in cases of greatest importance is that there shall be a verified complaint filed by the plaintiff. In criminal cases of major importance, before the indictment or information can be filed, there must be an investigation, before either a grand jury or a committing magistrate, to determine first, whether a crime has been committed and second, whether or not the person accused is probably the one who committed it. In some cases both the hearing before the magistrate and before the grand jury are required. Such an investigation made by a committing magistrate is called a "Preliminary Examination" or "Preliminary Hearing."

This subject is covered in the code of Criminal Procedure of the American Law Institute by Chapter 2, Sections 39 to 60 inclusive.[1] Although this code differs in some respects from the restatements which are being prepared by the Institute in other branches of the law, those of its provisions which relate to the preliminary examination do not depart so radically from procedures known in many of the states that it cannot properly be called, as to this chapter at least, a "restatement." These sections have been produced as the result of a careful comparison of procedural rules established by statutes and decisions in the various states, followed by the selection of those which in the opinion of the draftsmen and advisers are calculated best to protect the interests of the accused and of society in this preliminary stage of prosecution.

It is well in determining the values of the rules which appear in these sections to consider first the purposes which are designed to be served by the preliminary examination. On behalf of the defendant, the nature of the accusation made against him is at once revealed; the persons who make the accusation are forced to state their case and the defendant is given this opportunity quickly to set aright any misconceptions or misunderstandings which may have arisen concerning his conduct. The preliminary examination provides also speedy protection against ignorance, viciousness or weakness on the part of prosecutors and police officers, perhaps acting under the influence of interested persons. It may also spare the innocent, accused person from the ignominy resulting from the more public exposé which occurs in the trial court. On the part of the people of the state, appearing as the plaintiff in the case, the preliminary examination provides a means for testing the complaints of prosecuting witnesses, determining their motives and eliminating accusations based upon misinformation or prejudice. It provides also an opportunity for compelling unfriendly or unwilling witnesses to testify, thus revealing to the officers of the state the existence or non-existence of criminal offenses. On behalf of both parties, the preliminary examination provides a means of avoiding the great expense, delay and waste of time of court officials, jurors and others, involved in a trial by jury in the higher criminal courts, by determining, in a judicial manner, the necessity for further prosecution.

The preliminary examination, as a judicial proceeding designed to secure the purposes just described, is known in all of the states of the union. It should be noted, in passing, that another form of preliminary examination, not judicial but rather inquisitorial in character, exists in some other countries.[2] Upon its promulgation, the code will

*Mr. Miller is Dean of the Law School of the University of Southern California.

1. An extensive collection of statutes and decisions is contained in the tentative draft of the code and may be obtained by writing to The American Law Institute, 34 Chestnut Street, Philadelphia, Pa., and enclosing $2.00.

2. The American Law Institute, Code of Criminal Procedure. Tentative Draft No. 1. (April 9, 1928) pages 26 and 27.

There are two distinct types of preliminary examination. One of these, which may be described as a judicial inquiry, is primarily for the purpose of determining whether there is probable cause for holding the accused for further proceedings, so that he may be released if such probable cause does not appear, and secondarily to perpetuate the evidence and to determine the amount of bail in case the accused is not discharged. The other type is inquisitorial in character and has for its purpose the obtaining of evidence of guilt by interrogating the accused.

The first type of examination is that which prevails in all the states of this country. The second has been a characteristic feature of the procedure in European countries. The extent to which this is true at present in England, Scotland, France and Italy, appears in the commentary to section 39.

In preparing the draft on Preliminary Examination the Reporters made a careful study of the "inquisitorial system" of examination. In the first draft submitted to the Advisers this system was presented in detail. (Crim. Proc. No. 5, p. 92). It was thoroughly discussed at subsequent conferences, with the result that the Reporters and Advisers unanimously concluded that it should not be adopted. The reasons for this conclusion were briefly as follows:

1.—The tendency in European countries, in which this system was employed, has been to abolish it entirely or to eliminate the drastic features. In England and Scotland it has been abolished. In France it has been extensively modified, so that in the ordinary case the accused is permitted to have counsel and is cautioned that he need not answer, while in Italy, although not permitted to have counsel and not cautioned, he is not penalized if he does not answer. (The procedure in the above-named countries is set forth in the commentary to section 39.)

2.—The system requires for its successful operation trained officials. In Continental Europe, where the practice prevails, the examining judges are not only lawyers, but have received special training in the arts of examination and cross-examination and in the weighing of evidence. In this country the magistrates are not equipped for such work, in many instances being laymen.

3.—A large percentage of the lawyers, with whom this matter was discussed, expressed views antagonistic to it, for example, (a) that it would violate fundamental principles of personal liberty, (b) that it is opposed to our tradition of fair play, and (c) that it would result in the unjust conviction of innocent persons.

4.—In view of reason 3, there would be so much opposition to

be examined, critically, by lawyers and legislators of the various states, largely from the point of view of differences between the sections proposed and sections now on the statute books. By way of caution it should be said that merely because a particular rule of procedure in a particular state may not have caused serious trouble, that does not necessarily prove that a different rule or a different phrasing of the rule might not better serve the efficient and orderly administration of justice. Only too frequently is it true that one state will carry on for years under an inadequate rule of law, while an adjoining state may be equipped with a much better one. It is urged on behalf of the draftsmen of this Code that fair and temperate consideration be given to each proposal.

One of the most important rules relating to the preliminary examination is, of course, that which provides for the determination by the magistrate whether or not the accused should be held to answer. Section 55 covers this point and provides that "If it appears that any public offense has been committed and that there is probable cause to believe the accused guilty thereof, the magistrate shall order him to be held to answer." In the statutory provisions of the various states are to be found in addition to the term "probable cause," the following: "sufficient cause," "just cause," "reasonable grounds," "probable grounds" and "probably guilty." Presumably the underlying concept in the minds of the legislators was the same in each case. Just what is "probable," or "sufficient," or "just," or "reasonable" is, of course, uncertain. The answer in each case must be given by the magistrate upon the facts as they appear to him, according to the law as he understands it, and according to the meaning of the term used which his previous education and experience has given to him. It would seem desirable to eliminate, so far as possible, confusion arising out of different terminology, when the concept is the same. Greater applicability of interpretative decisions in the various states and more perfect harmony in the administration of justice as between states, would result. The term "probable cause" is in most general use. A larger body of decisions speak in terms of "probable cause" than of any of the other terms. While it may properly be urged that such a change is not of vital importance, it can fairly be said in reply that as each small difference causes some confusion, misunderstanding, uncertainty and lack of effectiveness in the administration of criminal justice, to the extent that each one can be eliminated, to that extent will the whole be improved. In large measure the sections appearing in this chapter are devoted to just such rephrasing and restatement in the interest of such efficiency and orderly administration. There are in addition some provisions in the chapter which, if adopted in all of the states, will effect substantial changes in some of them.

Section 39, relating to the informing of the defendant of his rights, includes the provision that he shall be informed of his right to counsel. Some states do not recognize his right to be so informed. If the preliminary examination is to serve in full the purposes set out above, it would seem only proper that the defendant should have the right to procure counsel and should be so advised even though no provision be made for the assignment of counsel as is the usual practice in the trial court.

Section 40 provides for the waiver of the preliminary examination by the defendant and for his being held to answer by the magistrate in such case. Most of the states permit such waiver. There would seem to be no good reason why a preliminary examination should be required if the accused waives it, with full understanding of the effect of his action, especially as section 42 preserves the right of the state to require such an examination if it be thought necessary.

Section 43 limits the time, for which adjournments of the examination may be had, to six days, except for good cause shown. Such limitations are already found in the statutes of some of the states and the provision is undoubtedly a very salutary one. It is designed to eliminate arbitrary and oppressive action upon the part of the state, as well as delays upon the part of designing defendants for the purpose of spiriting away witnesses or otherwise interfering with the proper prosecution of the case.

Section 46 provides that all witnesses shall be examined in the presence of the accused and may be cross examined. Sixteen states have the same rule while eighteen others provide for examination of witnesses in the presence of the accused. A denial of either of the two requirements obviously limits the value of the preliminary examination. If a secret inquiry is desired it can be secured by an examination of the case before the grand jury. If the preliminary examination is to be a real, judicial investigation in which the accused is required to play a part, the interests of both parties would seem to require the fullest revelation of the facts of the case. This cannot be secured without both confrontation and cross examination. If it be urged that the defendant is properly protected by his right of confrontation and cross examination in the trial court, it should be said in reply that we are as much interested, at the preliminary examination, in determining whether there is a case against the accused which will stand up in the trial court as we are in protecting the interests of the defendant. If the evidence for the state cannot survive the process of confrontation and cross examination, the state is better served by having the matter disposed of at the time of the preliminary examination. If it be urged that in some cases the state's witnesses should be protected against intimidation, two answers are available; first, that the names and the testimony of the witnesses are available in the record and second, that such cases are of a type which should be presented to the grand jury rather than to a committing magistrate.

Section 47 provides for the taking of an unsworn statement from the accused if he wishes to

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such a practice by members of legislatures, that it would hinder the enactment of the entire code, if the inquisitorial system were incorporated into it.

5.—While the chief reason advanced by those who favor the system is that it will do away with the "third degree" there is no assurance that such result would follow.

6.—This system, if enacted, would violate the constitutions of all but two of the states. It would accordingly be necessary to secure amendment of the "self-incrimination" clause in the constitutions of most of the states, and in eight states complete new constitutions would be required. After careful consideration it was thought that there would be but slight chance of securing such constitutional changes.

7.—Finally, even if the necessary constitutional changes were made and the system adopted by the legislatures, it was thought that it could not be successfully operated, not only for the reason that there are no properly equipped officials, but because the great body of public opinion would be against it.

make such a statement. Section 48 provides for the reduction of such a statement to writing by the magistrate or by a reporter. Section 49 provides that the accused may, if he desires, be sworn and testify in his own behalf. Sections 47, 48 and 53 make such statements or testimony admissible in evidence against the defendant at the trial, but section 47 also provides that his refusal to make any statement may not be used against him. A number of the state statutes contain the same or similar provisions. The purposes hoped to be accomplished are as follows: first, by making such statements the accused may be able to convince the magistrate of his innocence, he is at least entitled to such an opportunity; second, the accused is very apt to tell a direct, truthful story at this early stage of the proceedings which will prevent his concocting a perjured defense, with or without the assistance of a shyster lawyer, prior to the trial; third, it is hoped by some persons that "if the person charged with a felony is given a prompt and public opportunity before a magistrate to make his statement, the police will have no excuse for conducting secret, unregulated and oppressive examinations."[3]

The hope expressed in the third purpose just set out, is a rather forlorn one which fails to take account of the ends accomplished by the police third degree. The police are not interested merely in a statement, made voluntarily by the accused person under the conditions existing at a preliminary examination, or the securing of evidence which may be used at the time of the trial. The police are frequently more interested in finding out, from the accused, other persons who were involved with him in the commission of the offense, or where stolen property has been hidden or in persuading the accused to enter a plea of guilty. The fact that from seventy to ninety percent of all persons, against whom judgments of guilty are entered, plead guilty without trial should demonstrate the other uses of the third degree, and the futility of the third purpose stated above.[4] The first and second, however, may very well be accomplished.

In Georgia the defendant is incompetent to testify in his own behalf.[5] This would seem to be a relic of the old English procedure long since abandoned in that country. In every other state provision is made in one form or another for the accused to testify as a witness in criminal cases, but in several of the states this privilege does not extend to the preliminary examination. Apparently the theory of the law, in the last mentioned group of states, is that the preliminary examination serves the same general purpose as the grand jury hearing at which the defendant is not usually required or permitted to appear. For reasons already urged it would seem highly desirable that the defendant should be permitted, but not required, to testify at the preliminary examination.

Section 51 provides for the reduction to writing, or the taking in shorthand and transcribing by a reporter, of the testimony of the witnesses and of the accused. Only eight states make this a requirement in all cases. Four additional states require it in cases of homicide or upon demand of the prosecuting attorney and two states upon demand of the defendant. Fifteen states provide substantially that the "testimony of the witnesses examined must be reduced to writing by the magistrate, or under his direction," and signed by the witnesses respectively, but four of these states make it mandatory only if in the magistrate's opinion justice requires it, and one state makes it mandatory only in cases of homicide. Several other states provide for the keeping of an abstract or other record of testimony and of witnesses. The provisions of section 51 would seem to be wise, whether or not the defendant be held to answer. If he be held to answer and goes to trial the evidence should be available either for purposes of impeachment or in the event that the witness cannot be found. If he be not held to answer, both for his own protection and that of the prosecuting authorities, a record of the examination should be available. Some opposition may be raised to the requirement that the reporter's notes should be transcribed in all cases, especially if the accused is not held to answer. Where reporters are paid by the folio for such transcribing, considerable expense to the county results. This objection could be met in either of two ways; first, by eliminating the fee system of paying reporters and requiring such transcribing as a part of the regluar work of such officer, and second, by requiring transcribing of the evidence only in cases where the defendant is held to answer and by requiring the filing of the reporter's notes in other cases.

Section 53 provides that the testimony of witnesses taken at the preliminary examination may be admitted in evidence upon the trial of the accused "if, for any reason the testimony of the witness cannot be obtained at the trial and the court is satisfied that the inability to procure such testimony is not due to the fault of the party offering it." Such testimony is made admissible by the laws of several of the states. In the Federal courts and in seventeen states, it may be received when at the time of the trial the witness is dead; in three states, when the witness is absent from the trial by procurement of the defendant; in seven states, when the witness is absent from the state at the time of the trial; in four states, when the witness is insane or too ill to attend. In each of the various situations just set out, a number of states hold that the evidence is not admissible. As a result, there is considerable confusion, where there should be great certainty. That confusion has probably arisen out of the attempt to make arbitrary rules for admission upon grounds which are difficult of ascertainment. Under such circumstances it would seem wise to make the admissibility of such evidence dependent rather upon the discretion of the trial court, requiring the judge in each case to be satisfied that, for good reason, the testimony of the witness cannot be obtained and that the inability to procure such testimony is not due to the fault of the party offering it.

Section 55, previously referred to on another point, contains a further provision which conflicts with the law, as it now exists, in several states. This section provides that the magistrate shall

3. Statement of committee on Criminal Procedure and Judicial Administration of the National Crime Commission, American Bar Association Journal, October, 1926, page 692.
4. Raymond Moley, 2 Southern California Law Review, page 97.
5. Code of Georgia, 1926, Penal Code, Section 1037.

order the accused to be held to answer for "any public offense" which appears to have been committed by the accused. In some states the accused can be held to answer only for the offense charged in the original complaint or affidavit. There is no good reason why the magistrate, who has before him evidence showing that a crime has been committed and that the person who is before him for examination has committed it, should not hold him to answer therefor rather than that he should be bound by a complaint, filed in haste and without all of the evidence in hand, by a person frequently not fully informed as to the laws defining crimes. There is no reason why a guilty person should escape on such a technicality. The fact that such a person may be proceeded against upon a new complaint is not a satisfactory answer because in that case the state is put to the added expense and delay of holding another preliminary examination. If it be urged that the defendant has not had a proper opportunity to defend himself upon the new charge, the answer is that the case is not supposed to be tried upon its merits at this time but that the examination is, as its name implies, merely preliminary, to determine whether an offense has been committed and whether there is evidence to indicate the probable guilt of the accused sufficient to warrant holding him to answer before a jury in the trial court. No such limitation is placed upon a grand jury and accused persons are regularly held for trial upon indictments found by grand juries without even a complaint or an opportunity for the defendant to be heard. If a grand jury hearing follows the preliminary examination, in such case, it is obviously even more futile to limit the magistrate to a holding for the particular offense charged in the complaint.

Section 56 provides that the magistrate may require a written undertaking to secure the presence of each material witness at the trial. Section 57 provides that sureties may be required to secure the presence of such witnesses at the trial. Section 58 provides for the commitment to jail of any witness who refuses to enter into such an undertaking or to provide sureties as required. These provisions are common in most of the states. Section 58, however, provides further for a conditional examination and the taking of the deposition of witnesses, so held, on application made by either party, after notice to the other; such examination to be conducted in the same manner as the examination before a committing magistrate. The section also provides for the admission of such depositions into evidence under the same regulations as are provided in section 53. Such a conditional examination is now provided for in only seven states. It is a procedure, however, which should be adopted by the other states. The imprisonment, by the state, of innocent persons is bad enough when such persons are accused of crime and held for trial, but the holding of innocent persons merely because they are material witnesses and unable to provide undertakings or sureties for their release is inexcusable. It is reason for amazement that the practice has not been more vigorously condemned and more generally prohibited. The loss of employment, the breaking up of homes, the delinquency of children and the commission of crime itself, are directly traceable to this practice. It should not require much argument to convince present-day, humane legislators of the desirability of this provision.

Section 60 prohibits the discharge of an accused person on a writ of habeas corpus and the holding of a preliminary examination invalid "because of any informality or error, which does not prejudice the accused in the commitment or the proceedings prior thereto." This provision is in line with the elimination of technical errors in criminal procedure generally. It is particularly appropriate as applied to a preliminary proceeding of this character. If the defendant is fairly tried on the merits by a jury there is no reason why the informality of proceedings leading up to the filing of the information or the finding of the indictment should be permitted to invalidate a conviction. For the same reason informalities or errors, which do not prejudice the accused, should not prevent the holding of a defendant for trial before a jury upon the merits.

As a matter of fact some jurisdictions have gone beyond the procedure contemplated in this chapter and have provided for the filing of informations in felony cases by prosecuting attorneys without preliminary examinations. While the draftsmen of this code were unwilling to adopt this new procedure, they were certainly justified in going as far as they did in proposing section 60.

In conclusion it should be urged again that the pride of local custom and familiarity with the established order should not be allowed to obscure the advantages of procedures already obtaining in other states and incorporated into this code. If there be kept in mind at all times a desire to improve the administration of justice and to better protect the interests of both the accused person and of society, the provisions of this chapter and of the rest of the code will be found much more palatable for local consumption.

The Primer for Jurors Again

IN the May issue of the Journal there was a notice in this department that the Attorney General of Maine, at the suggestion of a number of Judges, had prepared a "Circular for Trial Jurors." There was also a passing reference to the fact that the same sort of primer had been gotten out in New York State, but no statement that this had been done by the Attorney General of that State. As a matter of fact, the latter pamphlet, which seems to have been the first of the sort published, was prepared and issued under the auspices of the Judges of the Supreme Court, First Department, New York City. However, a number of readers assumed that the New York Attorney General was responsible for it and in consequence that office has received a good many communications on the subject, which it has kindly and patiently referred to us. In order to relieve it of this unnecessary labor, we suggest that those desiring a copy of the New York pamphlet should address the Commissioner of Jurors, County of New York, Hall of Records, Chambers St., New York City, who will doubtless be glad to send it if there is a supply available.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR, MANAGER
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PRESIDENT HOOVER'S LEGAL ENGINEERS

President Hoover's appointment of the Commission on Law Observance and Law Enforcement was timely. Something was needed to concentrate public attention on specific causes and specific remedies. In spite of the general talk about conditions, even the average intelligent citizen is hazy as to the subject. He hears a multitude of suggestions from many excellent sources. But what should be done and what *hc* should do and how he should do it still remain "greatly dark."

The Commission recently appointed should serve the invaluable purpose of making sound views of causes and remedies a part of the public consciousness. Backed by the prestige of its national character and, in particular, by the President of the Nation himself, it can secure for its conclusions an attention which no other body at present functioning in the field of law improvement could hope to attract. In brief, it can take the average intelligent citizenship into full partnership with the movement by giving him definite ideas of the objective to be attained and the plain reasons therefor. With a public thus informed, the problem of bringing popular pressure to bear to secure needed improvements will thus be rendered much less difficult.

Its usefulness will be increased by the extent of the commission which the President has given it. It was in the beginning assumed by many people that any body appointed would confine itself to the difficulties which have arisen in connection with enforcement of the Eighteenth Amendment and the acts passed to carry out its provisions. Even those who contemplated a more extensive commission might naturally have expected it to be asked to consider problems solely within the Federal field. But these impressions were quickly dissipated by President Hoover's pronouncements. He visualizes nothing less than a consideration of the whole problem of law observance and law enforcement. And he has justly observed that improvements in the Federal field will at least serve as an example to authorities in other jurisdictions.

The appointment of the Commission is timely in another sense. Never before has there been such a vast mass of material on the administration of justice available for the consideration of an official body. Much spade work has been done within the last decade in this country on the problems of criminal and civil administration of the law. Crime Commissions, Judicial Councils, University research bodies, legislative committees, Bar Associations and many other organizations, official and unofficial, have been working on such problems and, for the most part, according to the approved methods of scientific inquiry. Had a Commission been appointed by a President eight or ten years ago, it would have had perforce to convert itself into an original research body, and to contemplate a long program of investigation from almost the ground up. But fortunately the present body starts with a goodly amount of information from various reliable sources, which it will have the duty of evaluating and correlating in its final report.

Of course, even with all these advantages at the start, the Commission will have plenty of investigating to do. As Chairman Wickersham has pointed out, there is an immense mass of valuable data on the subject at the capitals of the various states and in official departments at Washington. However, it is safe to assume that there will be willing cooperation on the part of those most familiar with this material, with a view to forwarding the Commission's work. Then, as has already been announced, there will be hearings in a number of the larger cities of the country; and these will serve the double purpose of adding to the mass of information to be evaluated and of maintaining public interest in the plan to secure needed changes. But it has been suggested

that all this can be done and a report made by the Commission within two years.

In choosing the members of the Commission President Hoover did exactly what one would expect a distinguished engineer to do. He chose a number of experts who are familiar with the machinery to look over it, discover what was wrong and make recommendations for improvements. The engineering analogy may be carried considerably further, for the task of "legal engineering" which has been consigned to the Commission is like many other engineering problems in that it consists in finding ways of simplifying machinery, abbreviating processes, eliminating waste, providing certainty and quality in the output, and insuring an efficient personnel. The country as a whole will watch the Commission's work with interest and appreciation and the organized legal profession, in particular, can be relied on to extend its complete cooperation.

INTEREST IN THE MEMPHIS MEETING

The Executive Secretary reports that even at this early date the reservations at the headquarters hotel for the Annual Meeting at Memphis are practically exhausted. This is most significant evidence of the wide interest which the coming meeting south of Mason and Dixon's line is exciting. It does not mean that there is or will be any lack of accommodations for visitors. There are plenty of good hotels in the city and assurance is given that satisfactory arrangements will be provided for all.

In addition to the program of the meeting, which will of course be up to the Association's high standards, the visiting members may count on many other features of interest. The city itself with its historic background, its many evidences of prosperity and progress, its beautiful parks, its facilities for recreation and, in particular, with its proverbial reputation for genuine hospitality, will naturally come first. And at its feet rolls the Mississippi, still redolent of romance, rich with history, and immediately suggestive of one of the great problems to the solution of which the present national administration has dedicated itself.

Not many miles down its course from the city on the Mississippi side, the visitors will have an opportunity of seeing a part of the great levee system which now keeps the mighty waters precariously in bounds. Here and at many other points in the neighborhood of the city they will see fields white with cotton, for it is seldom that the full crop is gathered by the end of October. After the meeting there will be an embarrassment of riches in the choice of interesting trips to take—old battle fields, scenic beauties, national parks. Those who do not know this part of our America should find it all peculiarly interesting and informative. Those who do know it will have the pleasure of revisiting old and familiar scenes.

PUBLIC RECOGNITION OF THE BAR'S SERVICES

Striking illustration of the willingness of the press to give the Bar credit for its labors in behalf of constructive measures in the public interest is furnished by the following extracts, from two leading newspapers. The first is from the St. Louis *Globe-Democrat:*

"The annual meeting of the St. Louis Bar Association Monday, at which officers were elected, serves as a reminder of the high part this organization is beginning to perform in public affairs, how the members as individuals and the organization as a whole are not only upholding the wholesome ethics of the legal profession but accepting the responsibilities of citizenship. The Bar Association has become a constructive force in the affairs of the community in the last few years, and a potent and continuing influence in establishing and maintaining a high level of professional conduct in St. Louis, a conduct as important to the public as to itself. The Association has gained public respect because it has honestly won public respect. So its high purpose has become a stewardship."

The second is from the *Nashville Tennesseean:*

"One of the great constructive pieces of legislation passed by the present general assembly is the corporation act. This measure codifies, harmonizes and brings into line with other states, the laws upon the subject of the organization and operation of purely private or ordinary commercial corporations. It is the result of the activities of the Tennessee Bar Association. That splendid organization is responsible for this legislation which will be of great value to the people of the state."

REVIEW OF RECENT SUPREME COURT DECISIONS

Cost of Reproduction of Railroad Properties Must Be Considered in Determining Value for Recapture Purposes—Views of Dissenting Justices—Federal Interlocutory Injunction to Prevent State Administrative Authorities from Enforcing Stipulated Rates Held Improper in Interborough Transit Co. Case—Deduction for Obsolescence of Leased Buildings under 1918 Revenue Act—Bequest to Charity, with Provision for Maintenance of Wife from Fund until Her Death, Held Not too Uncertain to Be Allowed as Deduction under Revenue Act, etc.

By Edgar Bronson Tolman*

Railroads—Valuation—Cost of Reproduction

In determining the value of railroad properties for recapture purposes under Section 15a of the Interstate Commerce Act, as amended, the cost of reproduction of the properties at current prices must be considered as an element of value.

St. Louis & O'Fallon Railway Co. v. United States, Adv. Op. —; Sup. Ct. Rep. Vol. 49, p. 384.

The Court here considered the construction of § 15a of the Interstate Commerce Act as amended by the Transportation Act of 1920, which provides that in determining the aggregate value of railroad property on which a fair return may be earned the Commission "shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes."

Section 15a also provides that if any carrier or group of carriers under common control and management and operated as a single system receives a net operating income in excess of 6% of the value of its property used in the service of transportation, one-half of such excess shall be placed in a reserve fund by the carrier for certain purposes and the other one-half shall be paid to the Commission for maintaining a general railroad contingent fund.

The Commission instituted an investigation under § 15a in respect of the incomes of the St. Louis & O'Fallon Railway Company and Manufacturers' Railway Company. In this investigation it found that, although the stock of both companies was owned by the Adolph Busch Estate and the principal officers of both were the same, they were not carriers operated under common control and management within the meaning of Par. 6 of §15a. It found further that the Manufacturers' Railway had no excess income, but that the O'Fallon's property during 10 months of 1920 and during 1921 and 1922 and 1923 had amounted to stated sums, and in respect of such sums it had earned a net income in excess of 6%. A recapture order followed.

The District Court refused to set aside the order. On appeal this was reversed by the Supreme Court in an opinion delivered by Mr. Justice McReynolds. He first reviewed the facts and provisions summarized above, and stated that the Court accepted the conclusion of the Commission and of the District Court that the record failed to show that the two railroads mentioned were controlled and operated as a single system.

The mandatory effect of the statute requiring consideration of all elements of value was then adverted to:

> Paragraph 4, Section 15a, directs that in determining values of railway property for purposes of recapture the Commission "shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes." This is an express command; and the carrier has clear right to demand compliance therewith. . . .
>
> "The elements of value recognized by the law of the land for rate-making purposes" have been pointed out many times by this Court. (Citing Smyth v. Ames and other cases). Among them is the present cost of construction or reproduction.

Following this were quotations from *Smyth v. Ames* and *Southwestern Bell Telephone Co. v. Public Service Commission* emphasizing present cost of reproduction as an element of value.

Attention was then drawn to the Commission's report which was subjected to the following comment:

> The report of the Commission is long and argumentative. Much of it is devoted to general observations relative to the method and purpose of making valuations; many objections are urged to doctrine approved by us; and the superiority of another view is stoutly asserted. It carefully refrains from stating that any consideration whatever was given to present or reproduction costs in estimating the value of the carrier's property. Four dissenting Commissioners declare that reproduction costs were not considered; and the report itself confirms their view. Two of the majority avow a like understanding of the course pursued.

Statements in the minority opinion of Commissioner Hall were then quoted to explain the methods employed by the Commission in arriving at its valuation figures. These statements were to the effect that as to man-made units installed prior to June 30, 1914, unit prices of 1914 were applied. To like units installed between 1914 and 1919 the same prices were applied but to them were added a sum representing increases on those units during the period. From June 30, 1919, to the recapture dates valuations were made on the basis of the net cost of additions less retirements. Land was appraised at its current value measured by that of neighboring lands. Commissioner Hall's summary of his understanding of the Commission's position is stated in these terms:

> "Without summarizing the other processes, all clearly stated in the majority report, it will be observed that the rate-making value arrived at for the successive recapture periods, as for example the year 1923, rests upon 1923 market value of lands; costs of other property installed

*Assisted by Mr. James L. Homire.

since June 30, 1919; unit prices of 1914, enhanced by allowance for increased cost of units installed during June 30, 1914-1919; and, for the units installed prior to June 30, 1914, constituting by far the major part of the property, unit prices of 1914 without any enhancement whatever. As to this major part of the carrier's property devoted to carrier purposes in 1923 no consideration is given to costs and prices then obtaining or to increase therein since 1914."

After stating that the dissenting opinion referred to accurately describes the action of the Commission the majority of the Court expressed their objections to that action in the following language:

> In the exercise of its proper function this Court has declared the law of the land concerning valuations for rate-making purposes. The Commission disregarded the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority—"The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction."
>
> The question on which the Commission divided is this: When seeking to ascertain the value of railroad property for recapture purposes, must it give consideration to current, or reproduction, costs? The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed.
>
> It was deemed unnecessary by the Court below to determine whether the Commission obeyed the statutory direction touching valuations since the order permitted The O'Fallon to retain an income great enough to negative any suggestion of actual confiscation. With this we cannot agree. Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid. The only power to make any recapture order arose from the statute.

MR. JUSTICE BUTLER took no part in the case.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE dissented.

MR. JUSTICE BRANDEIS declared that the question on which the Commission divided is:

> Did Congress require the Commission when acting under §15a to give, in all cases and in respect to all property, some, if not controlling, effect to evidence establishing the estimated current cost of reproduction? Or did Congress intend to leave to the Commission the authority to determine, as in passing upon other controverted issues of fact, what weight, if any, it should give to that evidence?

The position assumed by the O'Fallon was said to be that, since construction costs during the recapture periods exceed the costs of 1914, the Commisson's order should be set aside because of its failure to place a valuation on previously acquired structural property higher than the valuation as of that year. As to this position MR. JUSTICE BRANDEIS conceded that the cases hold that current reconstruction cost is an element of value.

> But, while the Act required the Commission to consider all such evidence, neither Congress nor this Court required it to give to evidence of reconstruction cost a mechanical effect or artificial weight. They left untrammeled its duty to give to all relevant evidence such probative force as, in its judgment, the evidence inherently possesses. The Commission concluded that in respect to the evidence of reproduction costs the differences between the *Southwestern Bell* case and that at bar were such as to lead to different results in the two cases. It did so mainly because "in the administration of the valuation and recapture provisions," ascertainment of value "is affected by a vast variety of considerations that either do not enter into, or are less easily perceived in, problems incident to the regulation of local public utilities." (p. 27.) In my opinion the conclusions of the Commission are well founded. To make clear the reasons, requires consideration of the function of the Commission in applying §15a and of the problems with which it is confronted.

Then follows in the opinion a discussion of ten points. The limitations of our space prohibit any adequate exposition of these facts and the reader must be referred to the dissenting opinion.

The following comment concluded the opinion:

> This Court has no concern with the correctness of the Commission's reasoning on the evidence in making its findings of fact, since it applied the rules of substantive law prescribed by Congress and reached its findings of actual value by the exercise of its judgment upon all the evidence, including enhanced construction cost. . . . We must bear in mind that here we are not dealing with a question of confiscation; that we are dealing, as was pointed out in *Smyth v. Ames*, . . . with a legislative question which can "be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people."

MR. JUSTICE STONE delivered a brief dissenting opinion emphasizing certain aspects of the case. In it he said:

> Had the Commission not turned aside to point out in its report the economic fallacies of the use of reproduction cost as a standard of value for rate making purposes, which it nevertheless considered and to some extent applied, I suppose it would not have occurred to anyone to question the validity of its order.
>
> I cannot avoid the conclusion that in substance the objection, now upheld, to the order of the Commission is not that it failed to consider or give appropriate weight to evidence of present reproduction cost of appellant's road, but that it attached less weight to present construction costs than to other factors before it affecting adversely the present value of the structural property. . . .
>
> Without discussion of the evidence and other data which received the consideration of the Commission, the opinion of this Court seems to proceed on the broad assumption that the evidence relied on, mere synthetic estimates of costs or reproduction, must so certainly and necessarily outweigh all other considerations affecting values as to require the order of the Commission to be set aside. In effect the Commission is required to give to such index figures an evidential value to which it points out they are not entitled when applied to railroad properties in general or to this one in particular, and this, so far as appears, without investigation of the soundness of the reasons of the Commission for rejecting them.
>
> This Court has said that present reproduction costs must be considered in ascertaining value for rate-making purposes. But it has not said that such evidence, when fairly considered, may not be outweighed by other considerations affecting value, or that any evidence of present reproduction costs, when compared with all the other factors affecting value, must be given a weight to which it is not entitled in the judgment of the tribunal "informed by experience" and "appointed by law" to deal with the very problem now presented. . . .
>
> If full effect were to be given to it in all cases then, as the Commission points out in its report, the railroads of the country, valued by the Commission in 1920 at nineteen billion dollars, would have had in that year a reproduction value of forty billion dollars and we would arrive at the economic paradox that the value of the railroads may be far in excess of any amount on which they could earn a return. If less than full effect may be given, it is difficult for me to see how, without departure from established principles, the Commission could be asked to do more than it has already done—to weigh the evidence guided by all the proper considerations—or how, if there is evidence upon which its findings may rest, we can substitute our judgment for that of the Commission. Such, I believe, is the "due consideration" which the statute requires of "all the elements of value recognized by the law of the land for rate-making purposes."

Both of the dissenting opinions were supported by MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE.

The case was argued by Messrs. Daniel N. Kirby and Frederick H. Wood for the St. Louis and O'Fallon

Railway Co.; by Mr. Donald R. Richberg for the National Conference on Valuation of American Railroads, as amicus curiae by special leave of Court; by Mr. George W. Wickersham for the United States; and by Mr. Walter L. Fisher for the Interstate Commerce Commission.

Federal Courts—Jurisdiction to Enjoin State Court Proceedings

Where the effect of state statutes affecting stipulated rates of fare may without undue delay be determined by the state courts, the federal court should not grant an interlocutory injunction to prevent state administrative authorities from proceeding to enforce the stipulated rates, even though it be duly alleged that the stipulated rates have become confiscatory.

Gilchrist v. Interborough Rapid Transit Co., Adv. Op. 348; Sup. Ct. Rep. Vol. 49, p. 282.

The suit involved in this appeal was brought by the Interborough Rapid Transit and the Manhattan Railway Companies to obtain an interlocutory injunction restraining the Transit Commission of New York and New York City from requiring a five cent fare over lines operated by the Interborough and from preventing the charging of a seven cent fare. A statutory court in the Southern District of New York granted the injunction sought, but its operation was stayed pending the determination of a direct appeal to the Supreme Court. There the decision was reversed in an opinion by MR. JUSTICE MCREYNOLDS.

As the basis for its suit the Interborough asserted that the five cent fare originally stipulated, when it leased part of the lines from the City, had become noncompensatory; that the stipulated fare was not immutable, because the Public Service Law of 1907 directing reasonable rates had been incorporated into the agreements by a later contract; and that the Transit Commission had in effect denied its application for compensatory rates, depriving it of its property in violation of the Fourteenth Amendment.

The record, as summarized in the opinion, disclosed that the Interborough is a New York corporation with a capital stock of $35,000,000. It operates elevated and subway lines in four of the boroughs of New York City. Some lines it owns, others it leases. The elevated lines it leased from the Manhattan Railway Company in 1903 for 999 years; for them it pays interest on $45,000,000 of outstanding bonds, and 7% (now 5%) on $60,000,000 of capital stock of the Manhattan Company, plus $35,000 annually for administrative expenses. These payments total about $4,900,000 annually.

The subway lines leased from the City were constructed under three agreements referred to as Contracts Nos. 1, 2 and 3. Under contracts 1 and 2, entered into in 1901 and 1902 respectively, the City raised funds for the construction of certain subways, which it leased to the Interborough at a rental equal to the interest on bonds issued for raising such funds, plus 1% for amortization of the bonds. The construction under these contracts cost the City about $66,600,000. The term of the lease was fifty years under contract No. 1 and thirty-five years under No. 2—with renewal clauses in both.

In 1913 contract No. 3 was entered into between the City and the Interborough. Related agreements known as "Third Track Certificates," "Extension Certificates" and "Supplementary Agreement" were also made at that time. These provided for additional subways and extensions, a third track on the elevated lines, elevated line extensions, and for the operation of elevated trains over portions of the subways.

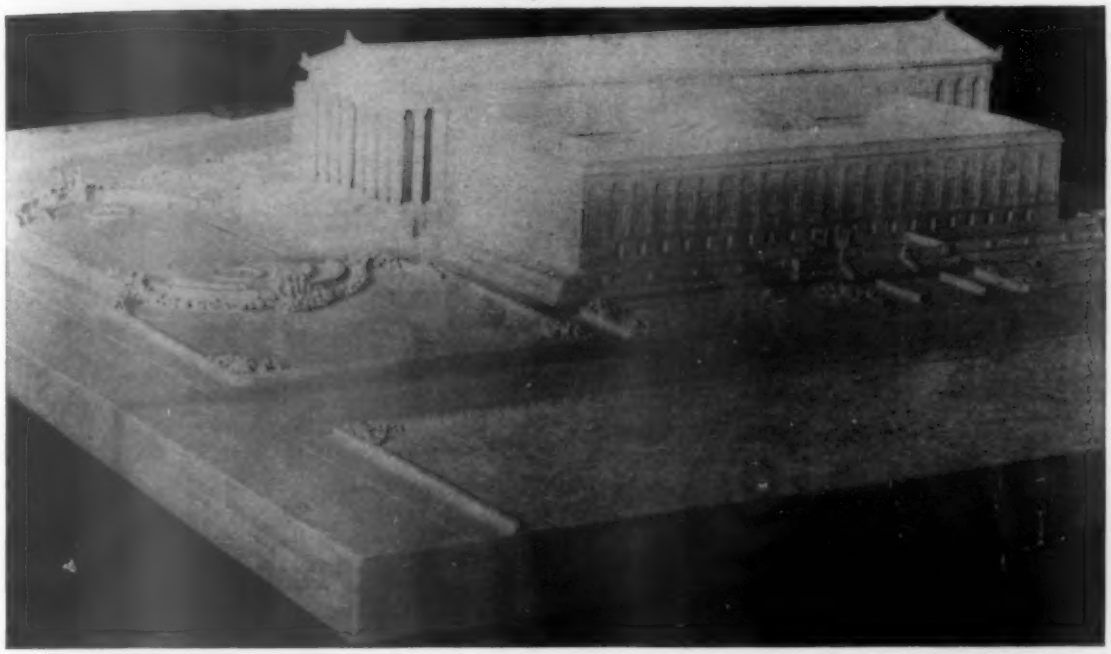
Contract No. 3 provided for extensive additions for which the City paid $113,000,000 and the Interborough advanced $58,000,000 for construction. The Interborough paid not over $62,000,000 for equipment. Title to both roadway and equipment vested in the City, and it leased both to the Interborough until 1967. Contracts 1 and 2 were adjusted to extend until the same year. No rental is required of the Interborough for the ways, but it did agree to make certain payments out of earnings after satisfying certain named demands.

All of the contracts expressly stipulated that the fare charged over the lines should be five cents and not more, and were made pursuant to a statute which provided that the roads should be the absolute property of the city. Contract 3, however, purported to modify the earlier contracts, but only so far as it expressly provided for such modification. It contained no express provision modifying the five cent fare clauses. It did, however, state that it was made subject to the Rapid Transit Act, which was to be deemed a part of the contract as if incorporated in it.

This latter provision became important as a link in the Interborough's argument that the fixed rates of fare originally agreed to had become flexible under the Public Service Commissions Law. That law was enacted in 1907 and provided that the rates charged by carriers subject to the jurisdiction of the Public Service Commission should be such as would yield a reasonable compensation for the service rendered. That law did not, however, alter the Rapid Transit Act, except to abolish the Rapid Transit Commission and transfer its jurisdiction to the Public Service Commission of the First District. It did not make the Rapid Transit Act subject to provisions of the Public Service Law, but did, by later amendment, subject the Railroad Law to those provisions. This was thought significant, apparently, as bearing on the soundness of the contention that the reference in Contract 3 to the Rapid Transit Act operated to bring the five cent fare within the jurisdiction of the Public Service Commission.

The financial results of operation of the elevated and subway lines are indicated by excerpts, quoted in the opinion, from an affidavit offered by the City. It contained the following statements:

> "The operation under Contract No. 3 has been highly profitable to the Interborough, as was the prior operation under Contracts Nos. 1 and 2. For the year ended June 30, 1926, the Interborough realized from the subway operation a net surplus of $6,569,573.03, after the payment of all operating expenses, taxes, interest and other fixed charges, including the rentals of $2,655,186.26 to the City under Contracts Nos. 1 and 2. The surplus is the amount available for the payment of dividends upon the capital stock of the Company so far as subway operation by itself is concerned. The amount of total capital stock outstanding is $35,000,000. . . . The subway earnings alone, therefore, under Contract No. 3, provide for dividend payments of over 18% on the par value of the stock. . . .
>
> "For 1927 the surplus amounted to $6,380,017.34. (The decline was due to a strike.)
>
> "For the current fiscal year ended June 30, 1928, the figures for the first six months are available and show a net surplus amounting to $3,687,000, which exceeds the surplus for the corresponding six months of the fiscal year before by $1,609,000.
>
> "These earnings are, of course, enormous and leave no room for claim that the five-cent fare fixed by Contract No. 3 is inadequate to give a fair return upon the investment of the Company in the subway properties, or that the five-cent fare is without due regard of the rights of the Company under the contract. . . .
>
> "The financial difficulties of the Interborough during



P. & A. Photo

Model of the Proposed New United States Supreme Court Building. It appears to realize Chief Justice Taft's opinion, voiced at the recent meeting of the American Law Institute at Washington, that "it must be a monumental building. . . . It must be a building of such dignity and such extent as to represent the Judicial Branch of the Government."

the past eight years, have been due to the elevated lease from the Manhattan Railway Company, and not to the subway contract with the City. The terms of the elevated lease provide that the Interborough must pay as rental the interest upon the Manhattan Railway Company bonds outstanding and dividends after an initial period, at 7% upon the capital stock. The dividend rate, however, was adjusted in 1922 so that the Interborough is now paying 5% upon about 94% of the capital stock, only if and as earned by the Interborough, and 7% upon the minority interest. The Manhattan Railway Company bonds outstanding amount to about $45,000,000 and the capital stock to $60,000,000. . . . In 1927, the interest payments on the bonds amounted to $1,808,240 and the dividends on the stock to $3,086,756. In addition to these amounts, however, the Interborough must pay also interest and sinking fund charges on its own bonds and notes issued for the third tracking, the extension of the elevated lines, and other improvements. The total fixed charges resting on the elevated division, including the dividend rentals, amounted for the year ended June 30, 1926, to $8,062,274.85. The income above operating expenses and taxes available for these charges, was only $3,936,396.50. The net revenues from the elevated fell short of earning all charges, including the dividends to the Manhattan Railway stockholders, by $4,125,878.35. For the year ended June 30, 1927, the corresponding shortage amounted to $4,909,129.66. . . .

"The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation. . . .

"Notwithstanding the extreme crowding which has existed for several years on the trunk subway lines, the number of passengers has increased steadily upon the subways, while on the elevated it has been decreasing. Since 1920 the transportation revenue (on subways) at a five cent fare has increased from $29,300,000 to $40,731,000 in 1927. For the first six months of the current fiscal year, the subway revenue was $21,433,000, compared with $18,647,000 for the same six months the year before; the growth is still continuing unimpeded.

"On the elevated lines the total transportation revenues in 1920 amounted to $18,450,000 and for the year ended June 30, 1927, to $17,951,000. During the first six months of the current fiscal year the elevated transportation revenues were $8,874,000, compared with $9,098,000 for the same six months the year before. The decline has not stopped. . . ."

The Interborough has attempted to obtain higher rates by proceedings before the Public Service Commission, and by memorials to the Governor and Legislature. All failed. Finally, on February 1, 1928 it filed with the Transit Commission schedules purporting to establish a seven cent fare effective March 3, 1928, to be put into effect on five days notice. No official action was taken by the Commission before February 14, 1928. Consequently, on that day the Interborough filed this bill. Later the same day the Transit Commission entered an order denying its authority to grant the new rates and ordered its counsel to proceed in the state courts to compel observance of the contract rates. These further facts were set forth by the Interborough in a supplemental bill.

After stating fully the facts summarized above, the Court stated its reasons for reversal of the decree. The chief reason was that the case involved serious questions of construction of state statutes which could best be settled by the state courts, and which orderly procedure required to be so settled after resort had been had to the Commission.

> The record is voluminous; the contracts between the parties are complex, the revelant statutes intricate. No decision of this Court or of any court of New York authoritatively determines the questions at issue. The basic one calls for construction of complicated State legislation.
>
> To support the action of the court below it would be necessary to show with fair certainty, first, that before the original bill was filed the commission had taken, or was about to take, some improper action in respect of the Interborough Company's new schedules or its application for leave to discontinue the five cent rate and establish one of seven cents; and secondly, that the five cent fare was so low as to be confiscatory while the proposed charge of seven cents was reasonable. We think neither of these things adequately appears from the record.
>
> At most, prior to the original bill, the Commission's members had accepted the view that it lacked jurisdiction

to permit a new rate because the existing one was irrevocably fixed by lawful contracts and had determined promptly to seek enforcement of the City's supposed rights by proceedings in the State courts. This was neither arbitrary nor unreasonable. No ground existed for anticipating undue delay or hardship. The purpose of the Commission was in entire accord with rulings announced as early as 1920 and seemingly no longer controverted when, in 1925, the Interborough applied for legislative relief. There had been abundant opportunity to test the point of law by appeal to the State courts.

The power of the City to enter into contracts Nos. 1 and 2 was affirmed in *Sun Publishing Assn. v. The Mayor, supra;* likewise the validity of Contract No. 3 was declared in *Admiral Realty Co. v. City of New York, supra.* These cases point out that the object of those contracts was to secure the operation of railways properly declared by statute to be part of the public streets and highways and the absolute property of the City.

The statute under which the Interborough undertook to proceed gave thirty days after filing of the new schedules during which the Commission might take action. The effect of the contracts, long the subject of serious disputation, depended upon the proper construction of State statutes—a matter primarily for determination by the local courts. The members of the Commission intended to take official action appropriate to the circumstances and neither what they did nor what they intended to do gave any adequate cause for complaint. Alleged newspaper stories and unbecoming declarations by counsel or City officials can not be regarded here as of grave importance.

Under the doctrine approved in *Prentis v. Atlantic Coast Line,* and *Henderson Water Company v. Corporation Commission* . . . the Interborough Company could not have resorted to a federal court without first applying to the Commission as prescribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought.

Both the bill of complaint and the argument of counsel here proceed upon the theory that under the law of New York, as clearly interpreted by definite rulings of her courts, the contracts for operating the transit lines impose no inflexible rate of fare. With this postulate we cannot agree. *People, ex. rel. City of New York v. Nixon,* decided July 7, 1920, is especially relied upon; but the circumstances there were radically different from those now presented. The effect of a contract with the City, expressly authorized by amendment to the Rapid Transit Act adopted subsequent to enactment of the Public Service Commission Law, was not involved. The Court carefully limited its opinion. And it said: "The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) [Public Service Commission Law] may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may now be changed."

The Court further stated that the facts disclosed by the record did not support the contention that the elevated and subway lines were a unified system for rate-making purposes, or that the return on the investment was indicative of a confiscatory rate.

The opinion concluded with the following summary of the Court's view of the case:

> The Transit Commission has long held the view that it lacks power to change the five cent rate established by contract; and it intended to test this point of law by an immediate, orderly appeal to the courts of the State. This purpose should not be thwarted by an injunction. Upon the record before us we cannot accept the theory that the subways and elevated roads constitute a unified system for rate-making purposes. Considering the probable fair value of the subways and the current receipts therefrom no adequate basis is shown for claiming that the five cent rate is now confiscatory in respect of them. The action below was based upon supposed values and requirements of all lines operated by the Interborough Company treated as a unit; and the effort to support it here proceeds upon a like assumption.

MR. JUSTICE VAN DEVENTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissented.

The case was argued by Mr. Charles L. Craig for city of New York on both original argument and reargument; by Messrs. William L. Ransom and George W. Wickersham for appellees on original argument; by Mr. Charles E. Hughes for appellees on reargument.

Taxation; Income Taxes—Deductions for Obsolescence of Leased Buildings

Under the Revenue Act of 1918 deduction of a reasonable allowance for obsolescence may not be allowed the lessee of buildings under a long term lease, in respect of wear and tear which have not been remedied by repairs.

Weiss v. Wiener, Adv. Op. 390; Sup. Ct. Rep. Vol. 49, p. 337.

The taxpayer, here claimed certain deductions for estimated depreciation of buildings which he held under 99 year leases, renewable forever. He asserted that Section 214 (a) (8) of the Revenue Act of 1918 entitled him to the deductions by reason of the fact that it permits "reasonable allowance for the exhaustion, wear and tear of property used in trade or business, including a reasonable allowance for obsolescence." He was allowed sums paid for repairs, but nothing for estimated obsolescence for which he had not paid. The taxpayer argued that not only covenents in the lease but economic necessity required maintenance of the buildings in good condition and that the amount needed therefor should be allowed as a deduction.

This contention was thought sound by the circuit court of appeals, but the view of the district court rejecting it was affirmed by the Supreme Court. MR. JUSTICE HOLMES delivered the opinion, and said:

> The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer. They do not charge for appreciation of property or allow a loss from a fall in market value unless realized in money by a sale. . . . A stockholder does not pay for accumulated profits of his corporation unless he receives a dividend. That is the general principle upon which these laws go. It is true that they allow for obsolescence of buildings, etc., where the loss is of materials not of money, but there as elsewhere the loss must be actual and present, not merely contemplated as more or less sure to occur in the future. If the taxpayer owns the property the loss actually has taken place. But with Wiener it had not, and it might never fall on him, as was pointed out by the District Judge. Some of the leases were assigned and others surrendered to the lessor. In such cases it would be a mere speculation to suppose that depreciation was taken into account in the transactions. Probably other and dominant considerations induced the acts. The event showed that in those cases there was no true basis for Wiener's claim.

United States v. Ludley, relied on by the Circuit Court of Appeals, was conceded to be authority for the proposition that the income tax is imposed on gains rather than on capital replacements. It was distinguished here, however, because there has been no present loss to which the estimated depreciation must be applied.

> In *Lynch v. Alworth-Stephens Company,* 267 U. S. 364, a statutory provision for deducting from gross income a reasonable allowance for depletions of mines was held applicable to a lessee bound to mine a minimum tonnage and to pay a stated royalty. In such a case the whole value of the lease is in the right to remove the ore, that is to destroy as rapidly as may be the real object of the lease. But in the case of a house or shop the value is not in the right to destroy and the destruction is only an undesired, gradual and subordinate incident of the use. The diminution in the value of a mine to the lessee is conspicuous, necessary, and intended, and is the very source of the gross income of the lessee from which it is deducted,

whereas the wear and tear of a house or shop in any given year may be only recognizable by theory and, as has happened in this case, may cost the lessee nothing while the premises are in his hands.

It does not matter that in Ohio, where the properties lie, these long leases are treated as in many respects like conveyances of the fee. The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption and that do not allow the deductions demanded whatever the lessees may be called. We understand this to be the view taken by the Department for a long time and we are of opinion that it should not be disturbed.

The case was argued by Mr. T. H. Lewis, Jr., for the petitioner and by Messrs. Edward W. Brouse and James S. Y. Ivins for the respondent.

Taxation; Succession Taxes—Deduction of Charitable Bequests

Bequests in trust for charity by a decedent after the death of his widow, who is entitled to use that part of the principal necessary to maintain her standard of living, are not too uncertain to be allowed as deductions under Section 403 (a) (3) of the Revenue Act of 1918.

Diminution arising by reason of postponement until the widow's death must be determined by mortuary table as of the date of decedent's death, irrespective of the fact that length of postponement became certain due to widow's death within the year allowed for filing return showing deductions.

Ithaca Trust Co. v. United States, Adv. Op. 357; Sup. Ct. Rep. Vol. 49, p. 291.

Here the plaintiff sought to recover taxes alleged to have been collected illegally under the Revenue Act of 1918. The plaintiff sued as executor and trustee under the will of one Stewart, who had left the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." Certain bequests to charity were left after the death of the wife.

The Court of Claims denied the plaintiff's claim, but its decision was reversed on certiorari by the Supreme Court, MR. JUSTICE HOLMES delivering the opinion.

The first question involved was whether the provision for maintenance of the wife made the gifts to charity too uncertain to be allowed as deductions from the gross estate under Section 403(a) (3) to determine the estate tax. It was answered in the negative.

> The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The second question arose by reason of the death of the wife within the year allowed by Section 404, and regulations, for filing a return showing deductions allowed by Section 403 and the value of the net estate taxed. The net estate taxed is ascertained by deducting gifts to charity, among other things. Their value is diminished by the postponement due to the length of the widow's life:

> The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. . . . The tax is on the act of the testator not on the receipt of property by the legatees. . . . Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. . . . Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future, and the value is no less real at that time if later the prophecy turns out false than when it comes out true. . . . Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortuary tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act.

The case was argued by Mr. A. F. Prescott, Jr., for the petitioner and by Solicitor General Mitchell for the United States.

Statutes—Validity of Regulation of Sale of Spectacles

The New York Statute requiring a physician or optometrist to be in charge of, and in personal attendance at, the place where spectacles are sold is valid.

Roschen v. Ward, Adv. Op. 392; Sup. Ct. Rep. Vol. 49, p. 336.

A statute of New York makes it unlawful to sell at retail "any spectacles, eye glasses or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold."

The complainants sought an injunction prohibiting the enforcement of the law, but the statutory court convened to hear the case dismissed the bills for failure to state causes of action. On appeal this was affirmed by the Supreme Court. MR. JUSTICE HOLMES delivering the opinion said:

> The complainants sell only ordinary spectacles with convex spherical lenses, which merely magnify and which it is said can do no harm. The customers select for themselves without being examined and buy glasses for a relatively small sum. It is said that the cost of employing an optometrist would make the complainant's business impossible, and that in the common case of eyes only grown weaker by age the requirement is unreasonable. But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This as it is presented seems to us a perversion of the Act. When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. If we assume that an examination of the eye is not required in every case it plainly is the duty of the specialist to make up his mind whether one is necessary and, if he thinks it necessary, to make it. We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean. Moreover, as pointed out below, wherever the requirements of the Act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.
>
> Of course we cannot suppose the Act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done—but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature not for the Courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretence.

The case was argued by Mr. Walter N. Seligsberg for the appellants.

ILLINOIS ASSOCIATION FOR CRIMINAL JUSTICE COMPLETES CRIME SURVEY

Results of Extensive Investigation of Illinois Body Summarized by Prof. Andrew A. Bruce in Recent Issue of Journal of Criminal Law and Criminology—Survey Reveals Antiquated Legal Machinery, Organized Crime, Demoralized Police and Unsatisfactory State's Attorneys—Other Details

THE results of the extensive survey of the administration of criminal justice and of the causes and conditions of crime in Illinois which the Illinois Association for Criminal Justice has been conducting for the past four years, and which promises to rank with the path-blazing crime surveys made in Missouri and Cleveland, are comprehensively analyzed by Professor Andrew A. Bruce in a summary of the survey printed as a supplement to the Journal of Criminal Law and Criminology for February, 1929.

The Illinois Association for Criminal Justice was organized in 1925, as a result of a movement initiated by the Illinois State Bar Association. During these four years, no less than sixteen separate reports have been made, each on a different phase of the crime problem in Illinois, and each by eminent authorities in that particular field. These reports have been published from time to time, and Professor Bruce's summary now reviews the results of the survey as a whole.

A large part of the survey concerns itself with the crime problems peculiar to the City of Chicago. The excessively high murder rate for which Chicago is notorious, Professor Bruce's summary says, "in spite of an almost national opinion to the contrary, is probably no greater than that of many other American cities, and is everywhere paralleled where similiar conditions prevail." The conditions responsible for Chicago's appalling record, the report found, are the large number of Negroes, who, though constituting only five per cent of the population, commit more than forty per cent of the murders, and the Italians and Sicilians who have been allowed to dominate the vice and liquor and gambling interests. Organized criminal gangs, composed mainly of Italians, were found responsible for more than a fourth of Chicago's gun murders.

Organized crime, says the summary, is in fact the principal source of the crimes of violence. The report on this subject, made by John Landesco, Research Director of the American Institute of Criminal Law and Criminology, under the direction of an advisory committee consisting of Judge Andrew A. Bruce and Professor E. W. Burgess, constitutes a full third of the survey and "unravels a startling and amazing story of the interlocking interests of gambling and bootlegging, vice and politics." A highly organized and syndicated system, whose business is vice, gambling and liquor selling, has the city by the throat, enforcing its decrees with bombs and murders.

These three "industries" of the underworld—vice, liquor and gambling—have recently been augmented with a new line of endeavor, the "racket." "Racketeering" is a process of levying tribute by violence and intimidation upon labor unions and merchant associations in return for actual or pretended services in maintaining price agreements. Gunmen have "muscled" their way into at least eighty otherwise lawful industries.

"Chicago," says Professor Bruce's summary of the survey, "has tolerated a mediaeval feudal system, it has had its war lords, it has had its armies of mercenaries. These armies have been recruited by the gambling, vice and liquor industries, but their services may be obtained by any one who will pay the price. The study of bombing shows that the bomber, like the gunman, has developed in Chicago a regular occupation with prices regulated to meet the job required. These charges are, relatively speaking, very reasonable."

A Who's Who of gangland was compiled by the survey from a list of seven thousand names of men active in various fields of organized crime. "These studies have shown, and this is a significant feature of the report, that the gangster as a rule is not born, but made. He is the product of his environment, and the chief blame of Chicago lies in the fact that it has allowed these environments to exist. Usually he comes from the river and railroad and other deteriorated and deteriorating districts of the city. Usually he started out as a mere mischievous boy in a street gang, which if properly controlled could have been turned into a Boy Scout organization rather than a band of thieves."

Jury System Hampered by Laws and Officials

Cumbersome rules of procedure and the inefficiency of the police and the state's attorney, are more to blame for unjustified acquittals than is the jury, says the summary, though the jury is more often blamed by the public. The jury can only pass upon the evidence before it, as Professor Bruce says, "and if the police and state's attorney have been remiss in their duties or if Organized Crime is allowed to resort to deeds of violence to the extent that it has been permitted in Chicago, the intimidation not only of the witnesses but of the jury itself, is something which can only be expected."

The jury system, the survey shows, is also hampered by constitutional restrictions and statutory provisions. The constitutional requirement of a unanimous verdict is critized, and the report while not definitely committing itself, leaves it an open question whether it would not be well to permit verdicts by something less than a unani-

mous vote. The statute making the jury the judges of the law and the facts in criminal cases the report condemns as "manifestly unsound"; as Professor Bruce says, "it imposes the duty upon men of no highly technical training; it precludes all possibility of having the law applied consistently in every case and does much to prevent satisfactory review of cases on appeal; it subjects juries to undeserved criticism for blundering in a field unfamiliar to them; and it relieves the courts of responsibility for upholding the law." The report also recommends raising the minimum age for jury service from 21 to 25 years, and "also questions the advisability of exempting women from jury service."

Prosecutors and Their Methods

An important portion of the survey concerned the office of state's attorney. Although throughout the state as a whole the qualifications and conduct of the state's attorneys were found to be comparatively satisfactory, a very different conclusion is reached in regard to the City of Chicago. There, during the last few years, the office of state's attorney "has been looked upon as a means of building up a political machine and of obtaining political power rather than as a prosecuting agency; many of the subordinates and assistants have been absolutely untrained and have been chosen for political rather than for legal considerations. There can be little question that many of the cases reversed by the Supreme Court were reversed on account of errors which the state's attorney and his assistants should never have committed and which the veriest tyro should have known would be fatal."

"Too much bargaining between the criminals and the state's attorney's office," was found to exist in Chicago and Cook County. A practice has existed for many years, the survey finds, of reducing the character of the charges from a felony to a petty offense. "Of 12,543 felony charges filed in the City of Chicago in 1926, 2,449 were found guilty of some offense; 1,978 or 80.75 per cent of those convicted were found guilty on pleas of guilty; and 1,559 or 78.81 per cent of all pleas of guilty were pleas to lesser offenses than the original charge, many of them to misdemeanors. Those pleading guilty to lesser offenses or found guilty of lesser offenses after a trial were 1,855 or 75.74 per cent of all convictions. Only 594 were convicted of the offenses charged, but of these 200 escaped punishment as felons through probation, other modifications of sentence, new trials and appeals, so that 394 or only 3.13 per cent of the total felony charges filed were finally punished for the offense originally charged in the indictment."

"These facts," says Professor Bruce's summary, "warrant the conclusion that bargaining for pleas of guilty by reduction of charge and promise of probation is so extensively practiced in Chicago that the significance of law enforcement is reduced to the minimum, and that, compared with the number of charges for serious major crimes, the number actually receiving adequate punishment is negligible."

The Municipal Court of Chicago is the subject of one of the reports made by the survey, and was studied by Professor Raymond Moley of Columbia University. This report, as summarized by Professor Bruce, shows that the standards of ability of the judges of this court have suffered a sharp decline since 1917. Politics is given as the reason. The office is obviously a political one, and the judge cannot always close his ears to the request of political leaders for leniency for political defendants, even though he wants to do the right thing.

The same report also found that the prosecuting attorneys in the municipal courts are "careless, unimposing, undignified and indolent." "Although they are required to fill out a detailed report of the cases which they try, an examination of these sheets indicates that some of the assistants scarcely rise above the literacy grade and the reports of many are of little value."

Police Force Demoralized

The Chicago police force, studied by Mr. August Vollmer, Chief of Police of Berkeley, California, was found to be sadly demoralized. The factors responsible for this condition, said the report, are the low standards of entrance requirements; inadequate preliminary training, and the absence of any training for sergeants, detectives and commanding officers; the brief tenure of office of the chief executives; the constant shifting of line and administrative officers; lack of support by prosecuting officers and court; and above all, the baneful influence exercised by administrative officials and corrupt politicians who have the power to compel precinct captains to do their bidding.

A new plan of organization for the police department is recommended by the report, the chief feature of which would be the divorcing of the functions of vice and traffic control from the duties of the ordinary policeman. "Protecting life and property and preserving the peace are the primary duties of the police and the less they are burdened with vice and traffic control, the more successfully will they perform these duties. This is one reason, at least, why vice and traffic control should be detached and new departments created to deal with these subjects. Another cause for such a divorce is the corrupt influence that vice control has upon the police. Finally, and most important, the power to dominate police departments, now exercised by the political crooks, will be considerably curtailed because responsibility for non-enforcement of vice repression can be definitely traced to an individual or a group; at any rate, and in all cases, upon an individual in connection with a regular police branch of the government."

Rural police protection is covered in another report, by Bruce Smith of the National Institute of Public Administration, New York. This report, as summarized by Professor Bruce, concludes that the agencies of rural police protection are entirely inadequate, and advocates the abolition of the State Highway Police and the creation of "a trained and mobile force of State Police, operating under a single administrative head, who should be responsible to the Governor alone."

The ancient agencies of rural police administration, the sheriff and the town constable, the report says, are entirely unable to cope with the rural crime problem, as is demonstrated by the fact that the bankers' councils have found it neces-

sary to employ an army of 3,200 men, as a special bankers' police force.

The office of coroner which Professor Bruce terms another "medieval survival," is also found to be of no utility, and its abolition is advocated in favor of a procedure similar to that of Massachusetts.

Would Abolish Concept of Responsibility

The insane and the juvenile offender were also made the subjects of special reports. The report on the trial and disposition of the deranged and defective defendants contends strongly for the individualization of treatment and of punishment, and protests against the theory that punishment is the "be all" and "end all" of criminal law and criminal administration. The conclusion reached is that in criminal cases, questions of responsibility, mental or otherwise, should not be determined by the jury. The sole question for the jury to decide should be: "Did this person commit the offense with which he is charged?" If the jury finds that he did the act, he should be sentenced to an indefinite term, after which he should be studied psychiatrically and medically, to determine what treatment is necessary to rehabilitate the person, if that is possible, and where this treatment can best be administered. If in prison, he should be sent there; if in an insane hospital or other institution, he should be sent to such institution.

"The study of juvenile delinquency," says Professor Bruce's summary, "strongly supports the theory that environment is the chief factor in the creation of the juvenile criminal." The survey also disclosed an alarming increase in juvenile delinquency. The highest ratio was found in the deteriorated areas adjacent to the Chicago "loop," an area of transients, occupied largely by newcomers and "down and outs." The ratio in this area was about 25 per cent, whereas in the outlying residential districts, the rate, with few exceptions, was below 2 per cent.

Further evidence of the importance of environment in juvenile delinquency is the fact, shown by statistics gathered by the survey, that in more than 90 per cent of the cases, the act charged was committed by two or more boys. In other words, more than nine-tenths of juvenile crimes are committed not by individuals, but by gangs. As Professor Bruce says, "The moral tone of a community determines whether these gangs or organizations shall be Boy Scouts or hoodlums."

The indeterminate sentence and the Board of Parole were also studied in the survey, with important results. Both the indeterminate sentence and the parole system, says Professor Bruce, are now recognized as wise policy, not only in America, but throughout the civilized world. The Board of Parole, he points out, under the present Illinois law, is made the real sentencing body. The Board, rather than the trial judge or jury, actually determines the period of confinement, so when it takes action after a prisoner has been convicted and sentenced, it is not, as public opinion sometimes feels, an interloper interfering with the discretion of the trial judge. Also, the oft-heard criticism, that the Board is responsible for the crime wave by turning hundreds of criminals loose on parole, is not borne out by statistics quoted in the report, which show that the per cent of prisoners granted paroles during the recent administration of Len Small was lower than during any prior administration since 1901.

In 1927, says Professor Bruce's summary, the Illinois legislature passed a new act concerning the Board of Parole, which "was a landmark in American jurisprudence." It was accompanied by a generous appropriation, which contrasts well with the ridiculously small legislative appropriations provided in practically every other state. Nevertheless, the survey points out, the act leaves the Illinois system still "radically defective." Political domination of the Board is not guarded against. The act created a new and practically independent Board of Paroles, but, says the summary, "was radically wrong, however, in limiting the activities of the Board to the granting and refusing of paroles, and in denying to it as an independent body the supervision of the parolee after he had been released from the penitentiary and the parole had been granted."

Most of the experts who prepared the reports were drawn from the legal profession and the universities, and gave their time in research and writing reports without compensation. They include: Professor Andrew A. Bruce of Northwestern University Law School, Professor E. W. Burgess of the University of Chicago, Gustave F. Fisher, Chairman of the Jury Service Committee of the Industrial Club of Chicago, Albert J. Harno, Dean of the College of Law of the University of Illinois, John J. Healy, former State's Attorney of Cook County, Dr. Ludvig Hektoen, pathologist and Chairman of the Medical Division of the National Research Council, Dr. Herman W. Adler, State Criminologist, Dr. H. Douglas Singer, alienist, E. W. Hinton, Acting Dean of the University of Chicago Law School, and William D. Knight, State's Attorney of Winnebago County.

Other experts were drawn from various fields: C. E. Gehlke of Western Reserve University, who served as statistician for the survey, Bruce Smith of the National Institute of Public Administration, New York, August Vollmer, Chief of Police of Berkeley, California, Professor Raymond Moley of Columbia University, Arthur V. Lashly of St. Louis, Mo., Director of the Survey, W. C. Jamison, Assistant Director of the Survey, John Landesco, Research Director of the American Institute of Criminal Law and Criminology, Clifford Shaw, of the Institute of Juvenile Research, and Earl D. Meyers of the University of Chicago.

Inquiry Into Law Enforcement Situation

"Born of the interest centering about President Hoover's appointment of the Wickersham commission to study the administration and enforcement of law, a public and popular inquiry under trained leadership into the crime and law enforcement situation will feature the third Institute of Public Affairs which is to be held again at the University of Virginia from Aug. 4 to 17. Dr. Raymond Moley, Professor of Public Law at Columbia University and Research Director of the New York State Crime Commission, will direct the inquiry which will be made in the form of public discussion and individual investigation and contribution at a round table conference on alternate mornings during the two weeks of the institute's session. The director of the institute, Dean Charles G. Maphis, in announcing the tentative program, declared that widespread interest had already been manifested in this round table. It is expected to be the focal point for the expression of public opinion on subjects which must necessarily be studied more privately by the President's commission."—Press dispatch in *New York Times*.

RISING BAR ADMISSION REQUIREMENTS AND EVENING LAW STUDENTS

Survey of Distribution of Students Among Different Types of Law Schools in New York City, Chicago and Boston Throws Light on Efficacy of Movement to Improve Legal Education by Bar Admission Authorities and Standardizing Bodies

By Alfred Z. Reed*
Of the Carnegie Foundation for the Advancement of Teaching

FIGURES published in the Carnegie Foundation's Annual Review of Legal Education for 1928 show that students attending law schools situated in New York City, Boston (including Cambridge), and Chicago numbered, that autumn, 19,475, or about forty per cent of the total number of law school students in the United States. A survey of the distribution of this important group of students among different types of law schools, and of the changes which have occurred in this respect since 1922, throws considerable light upon the efficacy of movements to improve legal education by bar admission authorities and standardizing bodies.

Unequal Pressure Exerted Upon the Law Schools

The present is a particularly favorable occasion for such a study, for the reason that there is a great difference in the amount of pressure that has been exerted upon law schools in these three cities, during the last six years. This pressure is of two general kinds: legal pressure, exerted by the bar admission authorities of their respective states; and moral pressure, exerted by the Association of American Law Schools and the Council on Legal Education. The New York Court of Appeals has recently announced an increase in its requirements for admission to the bar. The normal immediate effect of such an announcement is to stimulate registration in law schools by students who seek thus to forestall the new rules. Later, when these rules have taken effect, we shall expect a corresponding falling off in attendance. For the moment, however, they obviously tend to produce a situation that nullifies the second type of pressure, so far as New York City is concerned. If law schools not members of the Association of American Law Schools, nor approved by the Council on Legal Education of the American Bar Association, are already prosperous, they have no material inducement to make their policies conform to the standards sponsored by these organizations.

In Boston there has been no recent change in the bar admission rules affecting the entrance requirements of law schools or the period of law study leading to the degree. Outside influence is reflected here solely in the circumstance that one full-time school has retained its membership in the Association of American Law Schools, and secured approval by the Council, only by raising its entrance requirements.

Chicago law schools, on the other hand, have been subject to both sets of influences. A bar admission rule requiring all applicants to have two years of college work or their equivalent as determined by examination, before beginning the study of law, came into full effect July 1, 1926. The resultant increase in entrance requirements, by schools that had previously admitted high school graduates, affected virtually their entire attendance in the autumn of 1928. In addition, two law schools of the "mixed" type were induced to secure membership in the Association of American Law Schools, and approval by the Council on Legal Education, by instituting, at an even earlier date, this and other reforms, including an extension of their "part-time" (evening or late afternoon) curriculum to cover four years.

Corresponding Differences in Number of Law Students

Such being the influences operating in the three cities, it is not surprising to find that during the last six years the increase in law students has been greatest in New York and least in Chicago, with Boston occupying an intermediate position. What is remarkable is that the disparity, both actual and measured in percentages, should be as large as is revealed by Table I—an increase of over five thousand, or over 100 per cent in New York, as against only a few hundreds, or fifteen per cent, in Chicago.[1] The figures are for the autumn of the years in question. For comparative purposes these are more dependable than the total attendance during the year, because of the complications produced by summer sessions.

Varying Proportion of Evening Students in the Three Cities

Even more significant is the relative increase in the number of part-time and of full-time students in the three cities. In New York, the number of those attending classroom sessions during the evening or late afternoon has increased in six years by 140 per cent, as against an increase of 63 per cent among full-time students. This latter increase, moreover, is entirely in the morning or early afternoon divisions of four "mixed" schools; an aggregate gain here, since 1922, of 94 per cent has been accompanied by a slight decrease in the number studying law at Columbia. In Boston, attendance at the three part-time schools has increased 69 per cent; at Harvard, 57 per cent; there has been a decrease of 28 per cent at the other full-time law school. In Chicago, on the contrary, there has been a decrease of 12 per cent in part-time students,

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1. Tables omitted for lack of space. Their significance is adequately summed up in the text.

as against aggregate increases of 43 per cent at the two full-time schools, and of 150 per cent at the two full-time divisions of "mixed" law schools.

As a result of these very unequal rates of growth, not only has there been a change, in each city, in the proportion of students attending law schools of different types, but there is also a marked difference among the three cities, in this respect. Comparison of Tables II and III, which analyze the attendance figures respectively of 1922 and of 1928, shows the following differences, among others.[1] Whereas, in 1922, Chicago had the highest percentage of part-time students (67 per cent) of any of these three cities, in 1928 it had the lowest (51, as compared with 65 per cent in Boston and 70 per cent in New York), and a much larger proportion of these men than before were in schools maintaining a four-year course. The percentage of students attending low-entrance full-time schools or divisions of mixed schools has greatly increased in Chicago, has greatly diminished in Boston, and has remained about the same in New York. Finally, the percentage of all Chicago law school students attending Northwestern University or the University of Chicago has increased substantially (from 26 per cent to 32 per cent); the corresponding figures for Harvard show only a slight increase (from 24.1 to 25.6 per cent of all students attending a law school in Boston or Cambridge); the Columbia figure has decreased from 12½ per cent to less than 6 per cent of all students attending law schools situated in New York City.

It would be a great mistake to explain all differences in the composition of the law student body of the three cities as due to the relative amount of pressure that has been exerted upon their schools. New York City, in many matters, is a law unto itself. Boston is a state capital, and state capitals normally contain more lawyers, and are a more fertile field for law school activities, than other cities of similar size. The four high-entrance full-time law schools—Harvard, Columbia, Northwestern, and the University of Chicago—operate on a plane which has thus far rendered them virtually immune to pressure at the hands either of bar admission or of standardizing authorities. At the same time, the size of their student bodies is influenced by their tuition charges, their relative appeal to students from other cities and states, the extent to which they deliberately curtail attendance as an aid to more efficient instruction, and the increasing interest which many of their teachers display in the cultivation of legal scholarship and the reform of law rather than the immediate training of practicing lawyers. In the presence of these and other varying factors, one cannot assume that New York's recent increase in bar admission requirements as to general education will in the course of the next few years produce results closely resembling those that have occurred in Chicago; nor that similar action by Massachusetts would similarly affect Boston schools, with anything like mathematical precision. Yet when every allowance is made, the figures provide impressive testimony as to what can be effected by the united efforts of courts, bar examiners, and bar associations.

Evening Students Everywhere Still in the Majority

It is as important, however, to understand clearly the limitations of this accomplishment as it is to appreciate its extent. What has occurred in Chicago has been a very decided shift from part-time into full-time study; and, incidentally to this, a shift among part-time students from three-year law schools into the four-year divisions of "mixed" schools, members of the Association of American Law Schools and approved by the Council on Legal Education. This outcome will undoubtedly be welcomed by those who have been responsible for the increased standards. Yet of at least equal significance are two further facts which the figures disclose. Chicago part-time law schools or divisions, in spite of the six-year drop, both actual and relative, in their student attendance, still contain more than half of the total number of law students in the city; and, of the remainder, a substantial and an increasing proportion are found, not in the two high-entrance full-time schools, but in the morning divisions of the two "mixed" law schools. Approximately one-third of the young men and women who are studying law in Chicago to-day are in schools whose sessions are conducted entirely in the evening or late afternoon; another third are in "mixed" schools, where they are almost equally divided between morning and evening divisions; the remaining third are in the law schools of Northwestern University and the University of Chicago, which offer full-time work only.

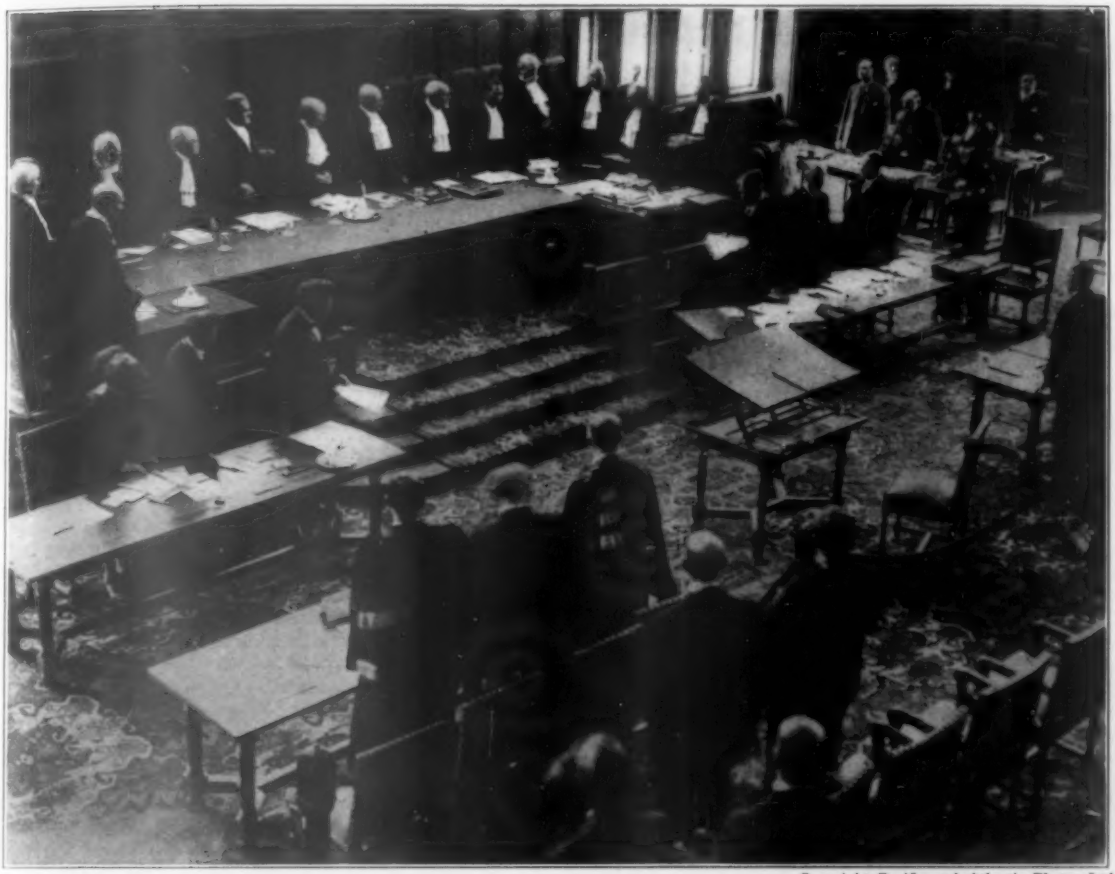
Types of Students Taking the Illinois Bar Examination

This must not be construed to mean that graduates of these three types of law schools are now entering the Chicago bar in approximately equal proportions. Analysis of data kindly supplied by the State Board of Law Examiners reveals that Northwestern University and the University of Chicago, in spite of their being attended, to a much greater extent than the other local law schools, by students who intend to practise outside of the state, contributed 38 per cent of all applicants from Chicago law schools who took the Illinois bar examination in July, 1928, and 46 per cent of those who were successful. Include applicants who secured their preparation outside of Chicago, and the total figures for this examination are as appears in Table IV.[1]

This table shows that forty per cent of all successful candidates in the Illinois bar examinations of July, 1928, were products of either part-time or of "mixed" schools, situated anywhere in the United States. It is impossible on this, or on any other basis, to calculate with any precision what was the corresponding percentage of newly admitted lawyers who intended to practise in Chicago rather than in the state at large. Presumably, however, the figure would be larger than this, though smaller than the proportion of Chicago law school students (two-thirds) who were shown above to be attending schools of this description.

Probable Change of Attitude Toward Evening Law Schools

Whatever be the precise percentage of the present annual increment in Chicago lawyers that has received its training in part-time law schools, it is clearly very considerable. It would be reduced somewhat if the bar admission authorities were to



Installation of Hon. Charles Evans Hughes as a Member of the Permanent Court of International Justice at The Hague. Left to Right: Fromageet, France; Pessoa, Brazil; Altamira, Spain; Nijholm, Denmark; Huber, Switzerland; Anzilotti, Italy; Loder, Holland; de Bustamente, Cuba; Oda, Japan; Hughes, United States; Negulesco, Roumania; Novacovitch, Servia; Hammerskjöld, Registrar, Sweden.

introduce an administrative check that has been found convenient in other states for the purpose of preventing evasion of the rules; if, namely, applicants should be required to register with the Board after they have completed their general education, but before they begin to study law. The figure would be reduced still further if the period of law study for part-time students were to be extended to four years. It is most unlikely, however, that any subsequent amendment of the rules, that would be practicable in the present state of public or of professional opinion, would serve to eliminate the part-time law school as an important agency in the recruiting of the legal profession in Chicago, in Boston, or in New York.

To conclude: Our present system of legal education and admission to the bar, viewed as a whole, cannot be regarded as satisfactory, yet is constantly improving. One evil, to which attention has recently been directed, has been a tendency for the bars of our larger cities to be submerged by the increasing output of low-entrance evening law schools. Illinois clearly points the way to one kind of remedy that can be effectively applied. Insistence upon higher entrance requirements has served there, and will doubtless serve elsewhere, to accomplish two ends: materially to reduce the number of evening law school students, and at the same time to improve their quality. The limit, however, of practicable, and perhaps of desirable, restriction by this method has now been nearly reached. The problem of the future is not so much how to discourage students from attending night law schools as it is how to make these necessary and important social institutions serve their purpose better than the best of them do now. They enable an element that is unable to attend our better full-time law schools to secure admission into the legal profession; and this is as it should be. But with the continued improvement of all law schools, the policy of encouraging those that operate primarily for the benefit of self-supporting students to resemble their full-time brethren as closely as they can carries with it one inevitable consequence. Part-time law schools are thereby condemned in perpetuity to occupy the tail of the procession. They, and those that believe in them, will not permanently acquiesce in their treatment as second-rate left-overs in our American scheme of educational development.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE Law of Building and Use Restrictions in Pennsylvania, by Spencer Ervin. New York: Clark Boardman Company, Ltd., 1928. Pp. xliv, 323. Building Restrictions make a fascinating subject. Not so much, perhaps, *per se*, as because they disclose general social and political conditions through the ages.

As used by and known to the present generation, and as imposed by private persons, private agreements and covenants, they are of rather modern origin, mostly dating from the inception of the "industrial age" and the rapid growth of cities. Prior to that time, not much is heard about them, but they existed just the same, the difference being that in autocratic and oligarchic times no agreement was needed. If the lord did not want a pig-sty, or a tannery, or a coppersmith's shop right under his windows, he simply forbade the establishment or maintenance thereof, and that settled it.

Many or most, perhaps all, of the many restrictions in the use of land which we now consider as incidents to the various kinds of tenure, or to the varying nature of the different kinds of property, originated as restrictions imposed by order of the lords or by mutual covenants among the villagers; the old form of community ownership was founded upon restrictions. Yes, it may be said that the whole of the feudal system and most of the tenures known since the time of the Carolings originated as, and were intended as, restrictions devised to curb the anarchy arising from the allodial system of land ownership.

And we see that, as soon as the autocratic systems of government commenced to crumble, the claim to an "absolute right of property" reasserted itself, with the consequent anarchy in the laying out of land, use thereof and building thereon, so that, even while the individualistic view remained supreme, it became necessary to find some way of circumscribing and curbing the anarchistic tendencies of land owners.

Very little could be done by legislation. Interference by the public authorities would have been considered an usurpation, a violation of the principle that no man should be deprived of his property except in case of public necessity, and then against a full consideration only.

But, as noisy, ill-smelling, polluting manufactories sprang up, it became necessary, especially considering the then existing hygienic regulations, to find some way of protecting at least the more affluent members of society from common nuisances and to give them a chance to lead a tolerably healthy and peaceful existence. Hence the many building and use restrictions which sprang up in most countries from and after the year 1800, the so-called "villa restrictions" of continental Europe.

As long as the extreme individualistic view remained supreme, as long as the right of property was considered an absolute right, courts did not look with favor on restrictions on this right. On the other hand, during the same times, "contract" was a sort of magic word; a contract was the foundation of society itself; contracts were declared to be almost holy.

There was the dilemma. Here was a situation where the absolute right of property was being violated; at the same time, these violations were founded on contracts. *Que faire?*

The courts overcame the difficulty by saying that restrictions were not favored by the law, but at the same time, if the contracts establishing them were clear and explicit, and the restrictions were not in themselves unreasonable or against public policy, they would be enforced according to their direct content.

These dicta salved the individualistic consciences of the judges, but in themselves said nothing. Each restriction would have to be taken up by itself.

These original restrictions were all directed against what is generally understood as nuisances in closely built up neighborhoods, urban and suburban, and in addition they provided against the shutting out of light, air and view, and almost all of them were and are beneficial.

There is an old saying that if you allow the devil to get hold of the tip of one of your fingers, he will soon have possession of the whole arm. Building restrictions have proved themselves to be a sort of devil of this kind. We now have developments of suburban settlements, where the deeds contain three or four full pages of restrictions, giving the most minute directions, not only about what may be built and occupied on the lots bought, what distances the houses and garages shall set back from the lines, who may occupy the houses, etc., but also whether the owner may fence his lot or not, how he may fence it, how high his shrubbery may be allowed to grow; and his plans for his house must first be submitted to and approved by somebody else. Whatever the value of such restrictions and conditions may be in other respects, their effect is that the owner of the land ceases to be the owner in the accepted meaning of the word and sinks down to be a licensee allowed—for a consideration—to live on his property in the manner and way dictated to him by strangers. Of course, this is one of the manifestations of the general tendency towards standardization. Not only automobile parts and all other mechancial appliances must be standardized (and this is all to the good), but "what we shall eat, what we shall drink and wherewith we shall clothe ourselves" is coming under the same rule.

Every dog has its day, and when its day is over, its place knows it no more. This riot of contract restrictions is now in full bloom. It has its day, but there are signs that its day is nearing its end.

The extreme individualistic view of man and his rights has all but disappeared. Men realize that they

are not only individuals but members of society, and that society has not only rights but duties towards them all, not only the well-to-do but all, the poor perhaps even more than the others, because they cannot help themselves.

Hence, among other things, our modern building and sanitary codes and regulations, and hence the zoning laws now coming into effect in so many places. Men realize that they cannot rely on private contracts as to restrictions, because these are bound to be haphazard, sporadic, highly variable and arbitrary, and if continued for any great length of time they will produce a building and use anarchy, which no court will be able to unravel and control.

Building and use restrictions as we have known them for the last 125 years have in the main been beneficial; they have acted as a stopper in a gap which had disclosed itself rather suddenly and which, at the time, could not be filled otherwise, but their day is passing, partly because they are overreaching themselves, the drafters of them seemingly lying awake nights figuring out new restrictions which might be imposed, and preening themselves on the multitude they can and do invent, and partly and mainly because society itself is realizing that city and town planning, building and sanitary regulation are its job, and that by it only can these things be accomplished in a tolerably satisfactory, just, practical and uniform manner.

But however all this may be, privately imposed building and use restrictions are with us and will remain with us for a long time (most of them run "forever hereafter"). And, in addition, however far public regulation of housing, building and use may go, there will always be room for special cases requiring special restrictions, and such will continue to be imposed.

* * * *

Mr. Ervin deserves great appreciation and thanks, not only from Pennsylvania lawyers but from the profession everywhere in the United States, for the book he has written on building and use restrictions, and especially for the kind of book he has written.

By their very nature and manner of creation restrictions are bound to be a very confused and confusing subject, and the usual way of treating a legal problem by copying off and trying to collate a mass of syllabi, *dicta* and *obiter dicta* from the reports and encyclopedias would not have been of much help in trying to obtain a general view and understanding of the subject.

The book is of great value as a practical guide to show what the courts, judging from past performance, will do to specific building restrictions, but of much greater value is the fact that it does not confine itself to treat the subject *de lege lata*, but also undertakes to consider it *de lege ferenda*, to blast a new road along which legal study and learning may proceed with the confident hope that it leads somewhere, that law, its study, its practice, is not bound to remain a marching on the spot, a sort of mental gymnastics, the forms, extent and purpose of which are bound by unbreakable dogmas, but is an ever-developing part of human and social life, in which the decisions and *dicta* of courts are but one, and not the most potent and important, influence. They register what has been reached, but do not limit what ought to be reached.

When the men of my age, some fifty years or more ago, studied for our degrees of A. B. and Ph. B., we were taught that Erasmus had made the foundation of scholasticism crumble, and that Bacon had demolished the edifice. Those among us who took up the study of law or theology found at once that this was not so, that both law and theology still reasoned scholastically and had to do it, so long as they continued to build on mentally binding and compelling dogmas.

All expositions of law to this day are scholastic in so far as they continue to build exclusively on precedents, and so is the case in our law where—in principle at least—each single decision (and opinion) by any court becomes and remains a binding precedent until overruled in due course.

We even retain the same forms for our arguments as were used in the disputation societies of the students of the sixteenth and seventeenth centuries, by which they proved *quod Petrus Decanus gallus sit*, and other such absurdities. By rule of court we must prepare our briefs and paper-books so as to conform to fixed scholastic rules and forms. They must contain: The question involved (Demonstrabo); the facts (Posito); the Argument (Arguo) and the prayer (Ergo), and, if we desire to do so, we may add our Quod erat demonstrandum.

Mr. Erwin's book is chemically free from all this. He proceeds in a perfectly natural way, concludes in a natural way, and even if he, by reason of the survival of certain old canonical hairsplittings incorporated in the common law, is compelled to treat of such things as base fees, preceding and subsequent conditions, covenants running with the land, the statute of frauds, etc., he is not blinded by them and does not look upon them as the acme of refinement of the human mind and reason. He knows that all rights run *ex die ad diem*, which *"dies"* may be now, later or eternity, and that of all the divisions of servitudes none are of value but that between positive (visible, apparent; invisible, non-apparent) and negative servitudes.

The book embodies the results of what must have been a very great amount of study, effort and labor, and shows how conscientiously, intelligently and successfully these have been pursued.

There are quite a number of subjects within our law needing unraveling and exposition by a man not hidebound in tradition and obsolete theories.

May Mr. Erwin see his way clear to take up some of them, and may he have followers.

AXEL TEISEN.

Philadelphia.

A Manual of Tuberculosis Legislation, by James A. Tobey, 1928. New York: National Tuberculosis Association. Pp. 86.—This is a comprehensive history of all of the important legal aspects of community control of human tuberculosis. It is a simple, careful and systematic statement of the important points that have been covered by state laws from 1893, when the first legal step was taken, up to and including the legislative work on this subject for the year 1927. Perhaps its greatest value is in its brief but careful criticism of typical state laws and the tabulations of what in the light of experience has been shown to be the essential features of a modern health law for the control of tuberculosis.

Tuberculosis continues to be one of the problems of the greatest social and economic importance. The National Tuberculosis Association has done a great community service in making Dr. Tobey's manual

available to all those who are especially interested in public health problems.

JAMES A. BRITTON.

Chicago.

Memories of Ninety Years, by Henry Monroe Rogers. Boston and New York: Houghton Mifflin Co., 1928. Pp. 409.—This book, with the sub-title, One Man and Many Friends, is the gossipy autobiography of the eminent Boston lawyer. The thirty-page chapter "My Life at the Boston Bar," which began in 1868, gives entertaining references to the Boston judges and lawyers of that period, and portraits of Federal judges Putnam and John Lowell, and of the author's associate, Edward D. Sohier.

The author served as naval paymaster on fighting ships from November, 1862, until August, 1865. In December, 1864, and January, 1865, during the bombardment and capture of Fort Fisher, his ship acted as tender to the flag-ship and repeatedly traversed the front line of fire at inexpressible risks, carrying messages to the different ships, and emerged unimpaired. The book gives first hand observations of and adds to our knowledge of the Fort Fisher engagements and the naval tactics involved. Commander Rogers, besides being a lawyer, is a man of affairs, a club man, a traveler, a maker of addresses, a cultivator of literary and dramatic circles, and a gentleman "with a joyous cheerful disposition ever looking at life hopefully and with an abiding sense of humor"; and his book is a book about cheerful yesterdays and pleasant todays. From his first important case, which he lost, he brought away the compliment from a Mobile lawyer, that "he had never met a man who fought so hard in court but carried out of court so little feeling toward his opponents." His answer, of course, was, *"I fight cases, not counsel."*

This hint to practitioners, and the naval material in the book, give it lasting value.

MERRITT STARR.

Chicago.

Federal Income Taxation, by Joseph J. Klein. New York: John Wiley & Sons, Inc., 1929. Pp. xxv, 2357 (text 1749 pages; appendices and indexes 608 pages).

Federal Tax Practice, by Robert H. Montgomery. New York: The Ronald Press Company, 1929. Pp. vi, 757 (text 447 pages; appendices and indexes 310 pages.)

Income Tax Procedure, 1929, by Robert H. Montgomery. New York: The Ronald Press Company, 1929. Pp. vi, 738 (text 444 pages; appendices and indexes 294 pages).

All three of the books listed above show careful study and presentation of bureau rulings and of the decisions of courts and of the tax board—a volume of authorities which has enormously increased within the last few years. No one of these new treatises undertakes an exhaustive treatment of procedure in suits for refund of tax; the principal attention is given to substantive law and to practice in the bureau of internal revenue and the board of tax appeals.

The parts dealing with the older provisions of substantive law and with income tax unit practice are decidedly the best; those dealing with matters usually considered in the office of the general counsel of the bureau of internal revenue and with tax board procedure, while reasonably complete, do not show quite as much constructive thought. Arrangement and indexing in all the books are excellent.

I. Dr. Klein's book begins with a group of six short chapters, which seek to do for the subject what an opening statement ought to do in the trial of a law suit. These chapters, treating generally and briefly such topics as the history of the income tax, the general features of the present revenue act, the concept of "income," the constitutional background, the attitude of the courts regarding interpretation of tax laws, and "accounting for income tax purposes," show a refreshing vigor and freedom of touch. They lay the kind of general foundation which it is helpful to keep in mind when attacking a new tax problem. So, also, the final chapter, of 20 pages, treating generally of "Tax Avoidance and Tax Evasion," presents a useful correlation of various concepts which the laws themselves do not bring together. The main parts of the book, dealing with substantive law and with procedure in the income tax unit, show a thoughtful and independent point of view, obviously enriched by practical experience.

One can be appreciative of the work done by Dr. Klein and his associates, of course, without completely agreeing with all of their views. To mention two examples only, question may well be raised as to the soundness of the statement on page 1748, "It is probably true that no corporation need really fear serious tax dangers from section 104" (regarding corporations utilized to avoid surtaxes), and as to the statement on page 1123, as to the effect of *Lederer v. Parrish,* 16 F. (2d) 928. This was a case bearing on the deductions of a partnership as a taxable entity (subject to the 1917 excess profits tax) but it is cited as an authority as to what a partner may deduct in his own returns. A curious slip is the failure to cite or refer to *Edwards v. Cuba R. R. Co.,* 268 U. S. 628, important because it bears on the difficult question, What is income?

There is an excellent list of magazine articles and books bearing on income taxation and the text indicates that they have been carefully read for the help they afford on difficult questions.

II. In Col. Montgomery's book on "Federal Tax Practice," the first 224 pages discuss in convenient and well-assembled form (1) the structure of the various administrative agencies in the bureau of internal revenue, and their methods of operation; and, (2) the law, regulations, rulings and decisions governing determination and assessment of tax deficiencies, payment and collection, the handling of credits, refunds and penalties. The next 168 pages deal with the history, organization and jurisdiction of the United States board of tax appeals, with comment and collection of authorities concerning practice before the board. The last part, 50 pages, summarizes the rules and decisions having to do with appellate review of tax board decisions and with suits for refund in federal courts.

Many of the still-unsettled questions of procedure which will occur to a lawyer who is prosecuting a tax case are certainly not directly answered in this (or perhaps any other) text-book, but considering the breadth and difficulty of the field Col. Montgomery and his associates have here produced a book which is useful and up-to-date and thoroughly justifies its publication.

The District of Columbia code of evidence, which applies in tax board cases, occupies 8 pages of one

of the appendices, and is useful to have in this form.

If a more voluminous treatment of the subject had been planned by the authors, other useful material could have been assembled. For example, chapter II, on statutory construction, does not show at what point the distinction lies between the rules for construing ordinary statutes and the construction of taxing statutes, and does not cite or discuss certain helpful decisions of the Supreme Court, such as *United States v. Merriam*, 263 U. S. 179, and *United States v. Field*, 255 U. S. 257. So, also, in the chapter on suits for refund in federal courts, one finds no reference to *Sage v. United States*, 250 U. S. 33, in which it was held that a taxpayer who brought suit against a collector of internal revenue to recover back a (succession) tax might thereafter sue and recover in the court of claims the unrepaid residue of such tax.

III. The third volume, Col. Montgomery's "Income Tax Procedure 1929," is a page-by-page annotation of his "Income Tax Procedure 1927," which was largely devoted to the substantive law of taxation. This supplemental volume shows the points at which the revenue act of 1928 is different from the earlier acts, and cites, with comment, the rulings and decisions rendered since the earlier book was published. Its 444 pages of text are serviceable not only in bringing a useful book up to date, but in segregating the income tax developments for a two-year period. If the earlier book may be compared to a balance sheet of the income tax situation which reflects "condition of the business" as of the beginning of 1927, the new volume serves the purpose of a "profit and loss account," and interestingly reflects the numerous changes in the income tax field during the period.

ROBERT N. MILLER.

Washington, D. C.

Losing Liberty Judicially, by Thomas James Norton. New York: The Macmillan Company, 1928. Pp. xiv, 252.—The decisions of the courts of last resort are at times surprising and again disappointing.

Our surprise and disappointment frequently, if not always, are due to the personal interest the lawyer has in a successful result of his labors. My experience in reading Mr. Norton's masterly treatise was, however, not one of surprise nor disappointment so much as of alarm. For the first time was I brought to realize the encroachments being made on the liberty of man and the almost complete failure to protect the minority against the oppression of the majority.

I believed that I was fairly well read in the current literature of the law; I found I was not. That decision after decision had been made taking away some of man's liberty. That the courts were slowly yielding to the "ambitious enterprise" of the legislative department and were being guided in their conclusion not by constitutional law but by morality and religion.

The courts say not so in their decisions, but moral and religious motives turn the scales of justice in too many close decisions.

Mr. Norton clearly shows the effect on the courts of last resort of the will of the people, the *"Vox populi, vox dei"*; the failure to weigh the rights of man by constitutional law, a law created to protect the individual against the masses.

Majorities have no need of constitutional protection. It is the lone man who was protected in his right to life, liberty, and happiness by our constitutions.

The text is cool, philosophical, and courteous to courts and judges, but Mr. Norton's conclusions cannot be brushed aside nor gainsaid.

Every lawyer should read this book and it is predicted that after reading he will plead guilty to more or less illiteracy of constitutional law and be genuinely alarmed over the trend of judicial interpretation.

Whether every lawyer reads this work or not, Mr. Norton has rendered valuable service to his country and earned the gratitude of lovers of liberty.

The bench should read "Losing Liberty Judicially" and, reading with open minds, if not agreeing with the author, should be grateful for the presentment made.

LORIN C. COLLINS.

Chicago.

Lawyers Directory for 1929. Forty-seventh year. Philadelphia: Sharp & Alleman Co. Pp. 301, 1467.

The American Bar, edited and prepared by James Clark Fifield, 1928. Minneapolis: The James C. Fifield Co. Pp. 1214.

Standard Legal Directory. Vol. 10, 1929. New York: Standard Legal Directory Co. Pp. 426, 79, 111.

The first thing to be noted in regard to the three books listed above is that they are all selective lists. That is, in their several ways, they attempt to supply the needs of the lawyer who is looking for reliable correspondents in other cities and states. They do not make any attempt to invade the field of the directory which claims to furnish a complete list, with addresses, of all the lawyers in the country. They may furnish little or no help to the lawyer who has the name of an attorney in a distant city and needs to verify his address.

The success and continuance of the three books here especially mentioned depends, in the final analysis, upon the scrupulousness and care with which the publishers select the names listed. There is evidence that every effort is made to protect the subscribers by restricting these lists to practicioners of recognized professional standing and of undoubted financial responsibility.

The first two of these directories indicate when attorneys or members of the firms listed are members of the American Bar Association. All of the books state whether the practice of those mentioned is general or special or both; and in what specializing.

The Sharp & Alleman apparently lists more smaller places than the other two, frequently giving a cross-reference to the nearest city, where the name of a reliable attorney is given. All three give in many cases the names of the banks, corporations and other public bodies for which the attorneys named serve as counsel.

It is pleasant to remark that all three of these directories include Canada. Sharp & Alleman and Standard add lists of attorneys in foreign cities who will act as foreign correspondents.

The Fifield seems to give the fullest information about the names mentioned. It strikes one as a legal "Who's Who" geographically arranged. It has the largest pages of the three and while its quarto size limits it to desk use its heavy-face type and the generous use of lead make it particularly easy to consult.

Of the nearly eighteen hundred pages of Sharp and Alleman, the directory proper occupies only about three hundred. Part II gives a synopsis of the inheritance tax laws and procedure of the several states. Part III comprises abstracts of laws and the calendars of the various courts. The digest of the laws of each state is prepared by a local firm whose name is

given in every case. There are nearly two hundred pages given to abstracts of the laws of eighteen foreign countries, also vouched for by competent authorities. The volume ends with one hundred pages of forms of acknowledgment and affidavits, also instructions for taking depositions.

The Standard adds to its list of correspondents the Patent Section roster of the American Bar Association and a list of officers and members of the American Patent Law Association. About eighty pages are devoted to professional cards and this is followed by a bank directory, which is successor to the Standard Mercantile Directory. In something over a hundred pages there is a condensed list of bank and bankers.

Sharp and Alleman contains a list of the principal legal journals, while the Standard publishes a list of the law libraries of the United States and Canada, compiled and kept up to date by a special committee of the American Association of Law Libraries.

It is not claimed that the above summary is a complete statement of all that these reference-works contain, but it will indicate that the busy practitioner will find one or all of them worth while additions to his shelf of ready reference books. I take it that the practice of the active attorney of the present day ramifies into many jurisdictions. Professional success is often a matter of making the right contacts and a good legal directory ought to be a real help in this respect.

ARTHUR S. MCDANIEL.

New York City.

American Presidents, by Thomas F. Moran, Professor of History in Purdue University, 1928. New York: Thomas Y. Crowell Co. Pp. 309.—Prof. Moran has undertaken something quite worth while the busy lawyer's time—a comparative analysis in a few swift strokes of the characteristics and personalities of the presidents of the United States. Probably no two people will agree in all his estimates—the tug of inherited traditions and prejudices is too strong. But it is something to have attempted, and the easy style in which it is written commends the little book to those of us whose memories may limp, but who would love to be refreshed with a comprehensive and brief glimpse at the procession of our past presidents.

The author is perhaps least fortunate in his treatment of Washington. Too much time is spent traducing the later biographers, like Hughes and Woodward, who after all have sought not so much to decry this great man (with his "liking for fine feathers" as Moran himself says) as to tell the truth about him. This truth has long been obscured by a blind hero-worship and a surprising shortage of authentic treatment. This is a "debunking" age, and the only way the truth may be read into the life of a great man is for someone to fill in the intervals between the gasps of awe. Prof. Moran places Washington in his true position, which, of course, lies somewhere between the legendary fatuousness of Parson Weems and the common-place details brought out by latter day biographers. It is an unhealthy state of mind that refuses to be told that its god is also a man. But the fact is made apparent that this country owes its life to Washington—and that he carried that prestige forward with good success into the initial years of its existence.

Prof. Moran's discussion and high alignment of the two Adamses seems timely and in the main just. It is just a little extravagant, perhaps, to say that the younger Adams must be accounted "the greatest man to occupy the President's chair for half a century," when the very next man is Andrew Jackson. The author gives due and interesting credit to Monroe and Jefferson and Madison. The interval of decided mediocrity after Jackson is ably set forth in trenchant strokes: "To sum up, then, two of the nine Presidents of this period—Jackson and Van Buren—have been generally underestimated; two—Harrison and Taylor—were military heroes; two others—Tyler and Fillmore—were accidents, somewhat distressing but not fatal in character, and the remaining three—Polk, Pierce and Buchanan—were, it must be admitted, rather common-place men for the high office of the Presidency."

The author places Lincoln as "by common consent the ablest of the Presidents with the possible exception of the first." He describes Johnson as "the low water mark of the Presidency." His discussion of Grant seems a bit two-sided, without sufficient final emphasis on the valuable recent contributions of Mr. Woodward on the subject of this peculiar national hero. Prof. Moran's view is best epitomized in his statement: "General Grant was a great man but not a great President."

Hayes is put in a more flattering light than we are accustomed to see. The author's treatment of Garfield, and of that amazing reformed politician Arthur, is most interesting. Cleveland is very fairly appraised, and his true importance properly stressed. We find, too, Harrison and McKinley painted in appropriate colors. Of the former he says that "for intellectual power Mr. Harrison was probably not surpassed by any of his predecessors"—an estimate with which few will disagree. And we are not allowed to view the extraordinary Roosevelt without some discriminating indication of his decided limitations. Of Taft, whose Presidency was blurred somewhat by his famous Winona speech, the author truly says: "At the present time probably no public man in the United States stands higher in the esteem of thinking men."

Wilson is admirably estimated, and his place in world history cautiously defined, "as one of the five greatest Presidents of the United States."

It seems to this reviewer that the author has dwelt too softly with the manifest limitations of Mr. Harding and the unconscionable crew that accompanied him to the White House. Coolidge, is, with kindly hand, and all too briefly, gently disposed of.

A chapter or two are devoted to the great men of the country who were not Presidents, and the question raised by Bryce why in the main we turn to mediocre men. There is a chapter, too, on campaign methods. But the book would serve its purpose better without these addenda.

The reading of the book is a pleasure, all the more enhanced by the difficulty of complete accord with the text. It presents a delightful and easily accomplished dip into the political history of our country that should not be missed by anyone who lays claim to general intelligence.

GEORGE PACKARD.

Chicago.

Conference of Referees in Bankruptcy

The fourth annual Conference of Referees in Bankruptcy will be held at Memphis, Tenn., on Oct. 21 and 22, immediately preceding the meeting of the American Bar Association.

THE LAW CODE OF HAMMURABI

Brief Analysis of This Remarkable Monument of Antiquity Which Is the Oldest Known Code of Laws—Character of Its Provisions—Class Legislation Revealing Social Conditions—Marriage and Family Life—Protection of Industry—Sections Dealing with Procedure—Later Influence of Code, etc.

By Erwin J. Urch, A. M., B. D.
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THE extent to which a study of the ancient code of Hammurabi[1] arouses and satisfies intellectual curiosity will in itself be the measure of the practical value of such a study. The students of historical jurisprudence are not the only ones who experience pleasure and profit in studying the oldest known code of laws, for it contains much that is familiar through similarity to modern law and much that is curious because it is crude and primitive. Therefore, one who aims to make accessible a new analysis of the Hammurabic laws is not necessarily guilty of pure effrontery or even of stupid repetition, especially since some of the better known histories of jurisprudence do not give adequate consideration to these laws.

Hammurabi was the sixth king of the first dynasty of Babylon.[2] That is, he ruled the city-kingdom of Babylon (2125-2080 B. C.).[3] Scholars have long been familiar with the name "Hammurabi." "Hammu" probably signifies a god. "Rabi" is common in the Bablyonian language and means "is great." The adoption of such a name was, therefore, an act of piety, quite consistent for kings who also functioned as chief-priests. Only a few hundred years before Hammurabi's time Babylon had grown from a mere village to the city of first importance in the Plain of Shinar. The new dynasty of kings under whom Babylon arose to power represented a newly arrived Semitic race. The new Semitic element retained names and words which they brought from another location. The first dynasty of Babylon is designated by some scholars as Arabian.

Of the kings of this dynasty Hammurabi was the most energetic. He established an empire which included the Tigris-Euphrates valley and territory north of the Arabian desert extending from the valley to the Mediterranean Sea—that is, all of the region known as the Fertile Crescent.[4] Much of his time was spent in warfare. But he also busied himself with digging and repairing canals which were used both for irrigation and transportation. He built and repaired walls, or fortifications, also shrines and temples, and often personally supervised the work of construction. His government was a benevolent paternalism. He retained most of the duties of government in his own hands, and did much of the work which in modern times would be distributed among subordinates. He was chief-executive, chief-engineer, head of the treasury, chief-priest, and supreme judge as occasion demanded. His agents and secretaries were personal employees or slaves in complete subservience to him. Of all the officials in his realm only the vassal-kings retained anything like the power of independent action.

Numerous letters,[5] besides the code itself, reveal the operations of the Babylonian government, the social conditions of the times, as well as the industrial activities. These letters probably were dictated to secretaries by the great king. They were written in cuneiform on clay-tablets as small as they could conveniently be, then covered with a sprinkling of sand and wrapped in clay-envelopes, baked hard in an oven, and finally delivered to letter-carriers. The letters represent Hammurabi directing the collection of temple-revenues, the care of the royal flocks and herds, the audit of accounts, the regulation of food-supplies, shipping and other transport, labor on public roads, the settlement of questions about debts and loans, and numerous other matters of greater or less importance. He carried on an extensive diplomatic correspondence with his governors and vassal-kings.

In the administration of justice Hammurabi was more equitable than would be expected in view of his opportunity to be otherwise. As far as possible he made himself accessible to all. He went so far in his effort to be fair and just as, for example, to enforce a merchant's claim against that of a city-governor. He dealt with bribery promptly. He was severe against money-lenders. He sent out instructions explaining how specific cases were to be tried. In cases involving large sums in debts and loans he ordered that the parties should be sent to Babylon, giving instructions that they should be guarded. The cases coming under the forms of legal procedure were essentially civil cases only. Criminal cases were dealt with in such a summary manner that the process could hardly be graced with the term "legal procedure."

In the second year of his reign Hammurabi began the reforms which culminated toward the close of his career in the promulgation of his code. No code of laws is ever strictly a new invention. The greatest historical significance of Hammurabi's code lies in the fact that it portrays customs which had prevailed among the Babylonians for several generations before his time. His contribution to jurisprudence consisted in transforming a chaotic mass of customs into something like an orderly sys-

1. Though there are numerous books on the subject, the following are some of the best in English: Harper, R. F., *The Code of Hammurabi* (2 vols., containing a translation and an exposition of the code); Johns, C. H. W., *The Oldest Code of Laws in the World*; Cook, S. A., *The Laws of Moses and the Code of Hammurabi*. The best general histories of Babylon are: King, L. W., *A History of Babylon*; and Rogers, R. W., *A History of Babylonia and Assyria*.
2. See Rogers, *op. cit.*, 312f.
3. See King, *op. cit.*, chap. III; and Rogers, *op. cit.*, chap. XII.
4. The extent of this empire is shown by the place-names mentioned in the Prologue of the code; so also the ways by which the several cities were held in subjection unner Babylonian control.
5. See King, L. W., *Letters and Inscriptions of Hammurabi* (3 vols.)

tem. Much that had been meaningless in the old customary law was either brought into workable relation to the rest or else discarded. Undoubtedly, the law-giver introduced into the code his own rulings and enactments which as a result of experience in the administration of justice seemed necessary to improve and supplement the old customs. Considerations of the gods and religious institutions of districts other than Babylon itself imply that the code contains parts of the customary law of these other districts.

The monument depicting Hammurabi's code was unearthed at the Acropolis of Susa during December, 1901, and January, 1902, by J. de Morgan. "There are many reasons for believing that this Code of Laws was published in many places."[6] That there were several copies of the code is shown by the existence of fragments of duplicates, many of which were found before the discovery of the fuller text. The British Museum contains a number of fragments of an Assyrian edition, prepared by scribes of Assurbanipal (668-626 B. C.). The text of several fragments of late Babylonian copies is in the Berlin Museum.[7] The code, therefore, was widely published and used long after Hammurabi's time. The discovery of the monument bearing on its front and back nearly all of the code greatly extended modern knowledge of ancient Babylon (2500-2000 B. C.).

The copy of the code found by de Morgan was engraved on three large fragments of a block of black diorite, which when fitted together formed a stele about eight feet high and about six feet wide at the bottom and tapering to about five and one-half feet wide at the top. On the upper front surface a sculptured bas-relief represents Hammurabi receiving his law from the seated sun-god Shamash. This bas-relief is about two and one-half feet high and about two feet wide. The Semitic inscription in cuneiform begins immediately below the sculptured figures. The text is arranged in parallel columns, each written belt-wise across the curved surface of the stele. On the front surface sixteen of the original twenty-one columns are preserved, five apparently having been cut off by an Elamite conqueror. On the reverse surface twenty-eight columns[8] are preserved, with only a few breaks. It is estimated that originally there were forty-nine columns, four thousand lines, and about eight thousand words,[9] and that there remain forty-four columns, three thousand, six hundred and fifty-four lines, and about seven thousand, three hundred words. Needless to say, this is one of the longest written records of so remote a time—four thousand years ago!

The code of Hammurabi is essentially a civil code. Compensation to the injured party paid by the accused party in cases which are now regarded as criminal, reveals the failure to look upon any act, except perhaps treason, as an offense against the State. The idea of an act being an offense against the community rather than against an individual and his family was of relatively late origin. Moreover, many offenses that would now be classed as public crimes were subject to correction through the agencies of religion: this practice helped to postpone the rise of public law. That is, the custom of treating certain acts as offenses against the gods, which, therefore, contaminated the community, carried with it the motive merely to appease the wrath of the gods and to remove their displeasure by inflicting punishment upon the guilty party. Under such conceptions, the court only indirectly served the interests of the State, for the State was not regarded as a party in the cases.

The essentially civil character of the code appears in provisions which not only required compensation as a form of punishment, but must have required self-help as the chief means of securing justice. For example, if an aristocrat should die as a result of a blow struck unintentionally, the offender "shall pay one-half mana of silver," or if a freeman should die under the same circumstances, the offender "shall pay one-third mana of silver." A "law of retaliation" seems to have been involved in some modes of compensation. For example: "If an aristocrat knock out a tooth of a man of his own rank, they shall knock out his tooth."[10] But again: "If one knock out a tooth of a freeman, he shall pay one-third mana of silver."

Class-legislation is a feature of the code. There were three distinct social classes, the highest class, comprising the aristocrats, or nearly all of the free-born citizens. Potters, tailors, stone-cutters, carpenters, and builders, who were paid a daily wage, but still belonged to old trade guilds, were in this class. But physicians, veterinary surgeons, and branders[11] were not so classed. A man was an "officer," and so at least temporarily in this class, while performing military service.

The next highest social class was made up of the common people.[12] They were not necessarily poor, for they possessed goods and slaves. They had no special association with the courts, except as they were summoned to answer charges brought against them. The code held this class, in comparison with the highest class, liable to smaller compensation for injuries inflicted and subject to less severe penalties for the more serious criminal offenses. The "commoner" made a smaller offering in the temple. He seems to have been obliged to serve in the army.

The third class was a numerous body of slaves. A considerable portion of the code provides for the recovery of runaway slaves, for the punishment for failures to return slaves to their rightful owners and for mutilations of the brands of slaves, and for the punishment of the runaway slaves themselves. Such extensive consideration of the status of slaves signifies that, since they were naturally not satisfied with their lot, some difficulties were experienced not only in maintaining the institution of slavery, but also in maintaining the status of slaves as chattels. They could be sold or pledged as securities. Damages done to them had to be paid for, the compensation going to the master. Although masters did not have the power of life and death over their slaves, they could punish them by mutilation. The slaves seem to have been recruited from captives taken in war. The code specifically regulates the status of slaves of different nationalities. There is

6. Harper, *Intro.*, xi.
7. Peiser, P. E., *Jurisprudentiae Babylonicae quae supersunt.* Cöthen. 1890.
8. That is, the original number of columns.
9. An average of two words to the line, for cuneiform words engraved on the hardest of rocks could not be confined to smaller space.
10. This must have been a figurative manner of referring to minor bodily injuries.
11. Branders of slaves and cattle were common.
12. Harper's translation of the cuneiform is "freeman."

no trace in the code or in contemporary documents, of serfs, such as were so common in Assyria and in the district around Harran in the seventh century B. C.

Slaves could acquire wealth and act in business as freeman, but their masters had to be cognizant of their transactions. Many slaves married and had homes of their own, in which cases the masters acted as patrons and recovered their slaves' debts for them. "A slave who married one of his master's slave-girls was able to acquire wealth, but his master was his sole heir, and his children were slaves."[13] Especially if a slave was in the service of a "great house," or of a freeman, that slave could marry a free woman, in which case the children were free and the free woman's dowry became hers at her husband's death and was to be distributed among her children at her own death. A slave was sometimes able to purchase his freedom with his savings. If a female slave became her master's concubine, her children were free, and so was she at her husband's death. "If her master chose he could acknowledge her children, and then they inherited equally with the children of his free wife; but these had first choice in the sharing of his property."[14] The code provides further stipulations as to such relationships between a master and his female slaves and between these and the master's free wife.

Not only does the code treat separately aristocrats, commoners, and slaves, but it legislates for specific classes within the three social classes. The first of such sub-classes comprised the feudal landowners who held land controlled by the government. The "levy-masters," or "officers," whose holdings seem to have been regarded as a part of their salaries, and who seem to have rendered local services to the government in return for the use of the land, enjoyed certain privileges of exemption from service and of protection from possible oppression by the governor. Associated with these "officers" were "fishermen," "hunters," and "catchers," whose duties seem to have been to provide food for the palace. Though less privileged than the "levy-masters," they, like their superiors, might be sent on special missions by the king, from the performance of which they could not escape by sending substitutes without incurring the penalty of death. Others held crown-land, not by rendering personal service to the king, but by paying rent or tribute. Both forms of land-tenure were inalienable and yet hereditary. But land held by foreign residents, merchants, and votaries had to be alienable; and yet the duty of service of some sort was required even of these occupants of the land. Some land was freehold, though the feudal status of property was the most common.

Votaries, or priestesses, were the subject of special legislation. A votary of Marduk was exempted from "duty," or feudal service. Votaries had complete control over their property, or not, according to their fathers' wishes. In any case they had a life interest in it. The code provides various ways by which such an estate should be administered. The votaries usually lived in a common home. Severe rules concerning their behavior comprise a part of the code.

Even the conduct of persons of certain professions was regulated by the code and the courts. The keepers of beer-shops, usually women, were not to sell above the lawful price and were otherwise restrained on pain of death for violation. The physician did not enjoy a high standing; he was never an aristocrat. The fee for a successful surgical operation was fixed by law, and the failure to succeed in a case was severely dealt with, even to the point of cutting off the offender's hands so as to prevent repetition of such failure. The veterinary surgeon, the brander who was frequently also a barber, and the builder were treated similarly. For example, the builder's fee was fixed by law, and his bad workmanship was punishable if it led to damage. He had to make good any loss, and repair at his own expense. If any personal injury was incurred by anyone, as, for example, by the collapse of one of the buildings or boats he had built, the builder had to suffer in a like manner, even to his own death in case the owner was killed, or his son's death in case the owner's son was killed. It is clear that property-owners were expected to take no risks.

Agriculture was also protected and regulated by law. Some land was regarded as private property, though subject to its owner's duty to the State. A tax was levied upon the crop in proportion to its amount. Land was sometimes given to a farmer to reclaim. For neglect to reclaim such land during a period of three years the penalty was that in the fourth year the farmer was to put it into a good state of cultivation, pay a legally prescribed sum as rental, and return it to its original owner. Rents for land, other methods of land-tenure, and the conduct of the farmers' business were fixed by law.

The Babylonian land-owners were often in need of ready money in spite of their great harvests. Floods often destroyed their crops. The landowner who had borrowed and had his crops destroyed by flood could postpone payment of the principal and pay no interest for a year. In no case could a money-lender take the crop in payment of a loan. Money-lenders were forbidden to speculate in "futures." Floods had to be provided against by an elaborate system of ditches and canals. Yet in the summer irrigation was necessary. A man was held responsible for the loss in case his dike broke as a result of his neglect; all his possessions could be sold, if necessary, to cover the damages. Wages or hire were fixed by the code, such, for example, as the hire for the harvester, the laborer, a wagon with its driver, a working ox, or an ox for threshing. The care of the hired animals was strictly guarded.

Vast flocks and herds were owned by individuals, and the code states definite wages for herdsmen and shepherds. These latter were held responsible for loss in the flocks or herds, except, as in the case of working animals, loss caused by a god,[15] in which event the loss was the owner's. Other responsibilities of the herdsmen and shepherds were specified. In all cases carelessness made the guilty parties liable to compensations and refunds, as, for example, embezzlement was punishable by repaying tenfold. Obviously the owner's ran no risks.

The shipping trade of Hammurabi's empire was large. Canal-boats, at least, were numerous. Commerce and fishing along the waterways were exten-

13. Johns, *"Code of Hammurabi,"* in Hastings' *Dict. of the Bible*, Extra Volume, 589.
14. *Ibid.*

15. That is, loss by accident, such as by lightning, for example.

sive. The builder of a ship had to give a year's guarantee as to its fitness; if a ship proved defective within the year the builder had to replace it with a sound ship. The wages of boatmen, as well as the hire of passenger-boats and freight-ships, were prescribed by law. The boatmen, too, were responsible for losses, if these were due to carelessness. A great deal of business was done by caravan, as well as by ship, with foreign countries. The code refers to captives taken and carried away from Babylonia, who were bought abroad by slave-dealers and brought back. Slaves were sold and transported abroad. Consignments of gold, silver, jewels, or portable treasures sent by a man resident abroad were protected by definite legislation. The carrier had to deliver the goods or else pay fivefold their value. Other specifications regulated this phase of foreign commerce. Warehousing and deposit were features of commerce, especially in handling grain. The storage of corn was particularly dealt with, even to the point of determining warehousemen's responsibilities.

Much is said in other sources[16] concerning interest on money. But the code states no more than that interest had to be returned with borrowed sums. Loans were frequent at harvest-time to enable farmers to pay their harvesters. Such debtors could pay with grain, according to the royal exchange value; and creditors could not refuse to take goods in liquidation of debts. But debts might lead to various forms of restraint, all of which were determined by the code. In the case of a man who incurred debt to the community, resulting, for example, through the breaking of his dikes, and could not pay, he was sold with all his goods and the claimants shared the proceeds. The code does not deal with sale, except to forbid the sale of benefices and to provide the possibility of demanding back the sale-price of a slave having an undisclosed defect. Houses were often hired for periods of one to ten years, rents were specified by law, and payment of rent usually had to be made semi-annually in advance.

Marriage and family life were carefully regulated by a large portion of the code. Both dowries and bride-prices were subjects of law. Only those women who had once been married or had been seduced were free to marry the men of their choice. The others were given in marriage by their fathers who might accept or reject the suitors. Marriage was by contract; a marriage-contract was drawn up, sealed, and witnessed. Desertion of a wife dissolved the marriage-bond. Persistent worthlessness of a wife and mutual aversion justified divorce. A husband had the power to divorce his wife with the words, "Thou art not my wife." But he could not do so without a cause. The wife could secure a divorce if she could prove cruelty. The Babylonian could have but one proper wife, though concubinage was permissible and common.

The father had power over his children to the point of being permitted to pledge them for his debts. Adoption was common, and an adopted son was as difficult to disinherit as a real one. Persistent unfilial conduct justified disinheritance, and ingratitude on the part of an adopted son was punished according to his status before his adoption. Sons inherited equally, but adopted sons were usually heirs to a residuary portion. A married daughter whose share had been given in her dowry inherited nothing at her father's death. But if she had not previously received her portion she had a life-interest in a share equal to that of a son. A father might give a favorite son a free gift in addition to his rightful share. A widow took a share equal to that of a son, together with property she held in her own right. Detailed specifications as to inheritance again show the efforts of the Babylonians to protect property and the interests of ownership. But a full testamentary disposition of property was not permitted by the laws of Hammurabi.

The first five sections of the Hammurabic code deal with procedure. The chief seat of justice was the temple, a possible evidence of the involution of religion in the administration of justice. The judge is seldom mentioned in the code. However, such references as there are show that the office was not one of pure caprice, nor of arbitrary independence. If a judge retried a case or altered his judgment once given, he had to repay twelvefold what he had prescribed as the penalty. His duties included the examination into depositions, fixing a time within six months for production of witnesses, beng present at the execution of sentences, reconciling fathers with their sons, making inventories of the property of widows' children on their remarriage, and settling family-quarrels. No priest was ever a judge. The judge had only local jurisdiction and seems not to have received any fee. The king's judges are mentioned, but it is not certain that he appointed them all.

There were three types of witnesses—the "elders" who acted also as a sort of jury, the "deponents" who were put on oath and whose false witness was penalized, and the attesting witnesses to a document. In case such a document embodied a legal decision all the "elders" acting in the trial were the attesting witnesses. Aside from similar brief references, the modes of proof employed are not revealed by the code. Likewise, the steps in the procedure are concealed. Whether the procedure in the court was accusatorial or inquisitorial, whether or not the State relieved the plaintiff of the responsibility of bringing a culprit to justice, and whether the prosecutor was a private citizen[17] or an officer of the State—these are questions which the code or any other source do not answer. But the fact that cases had to be adjourned sometimes to permit the production of witnesses would indicate that procedure in other respects was not definitely regulated by law. Purchase from a minor, deposit, and even sale was invalid without witnesses, and so witnesses must always have been necessary in the proceedings of the courts. There were no professional advocates, and so the plaintiff must have pleaded his own case. There are evidences in the code that the legal procedure was largely one of private self-help, similar to that set forth in the Roman Law of the Twelve Tables.

Specifications as to the death-penalty are frequent in Hammurabi's code. In some cases, however, the manner of inflicting the death-penalty is not specified. Of the prescribed forms of death-sentences there was burning, drowning, impalement, dismemberment, and other special forms.

16. See King, *Letters and Inscriptions of Hammurabi*, and *A History of Babylon*, in the latter of which a liberal use is made of the Chronicles of the kings of the first dynasty.

17. As the practice was in Republician Rome.

Other penalties intended as less severe were mutilation, scourging, banishment from the city, multiple restoration, and simple restitution. By whom the sentence of the law was carried out constitutes a question which the sources do not answer. It may be that the "catchers," the subordinate associates of the "officers," acted as police rather than provisioners of the palace and also performed a service similar to that of the lictors of a Roman magistrate.[18]

The crimes and misdemeanors considered in the code are numerous and often peculiar. There is the repeated insistence that the offender must be caught in the act. Theft and receiving stolen goods were dealt with severely, though apparently through a process of private self-help. Harboring a runaway slave and kidnapping a slave were treated in the same way as theft. Theft at a fire and receiving of stolen goods by a slave were regarded as particularly offensive. Brigandage, or highway robbery, was a capital offense. Offenses against property of whatever form were severely repressed. The possible types of assault were matched by just so many penalties. From the summary manner in which the worst cases of assault were handled, it may be assumed that death was the penalty for murder, though murder as such is not mentioned in the code. The principle of retaliation was applied even in the case of an intended crime; false accusation and false witness were brought under this principle. Slander against a respectable woman was punished by degradation to slavery. Breach of contract had to be made good and was often further penalized. Neglect of duty was severely punished. Oppression, bribery, and misappropriation of public property on the part of governors and magistrates were capital offenses. All disputed or unclassified cases were left to the decision of the king.

Though the Prologue pays its respects to the gods of the realm, the code itself contains very little reference to religion. Frequent mention is made of "strokes of god,"[19] by which responsible persons were relieved of blame for that which otherwise would have been a crime or misdemeanor. The code protected temple-property, putting it on a level with that of the "palace." Among the duties of the temple was that of ransoming its townsmen who may have been captured in war.

Hammurabi's code affords a view of Babylonia's administrative ideal and standard of justice. His age was one of strenuous growth, in the course of which the long linguistic and racial conflict was decided in favor of the Semitic. Yet Sumerian culture had left its traces; though having yielded dominance to the newer race, it gave more to the sum-total of Babylonian culture because it had more to give. Hammurabi's code, in a sense the product of this culture, was not extensively original, though it was far-sightedly adapted to contemporary needs. How much of Sumerian customary law actually passed into the later Semitic law cannot be determined. But the older customs long attached to the land could not have been easily crowded out. The code and contemporaneous documents present extensive evidence of the social and political structure of Hammurabi's age. An analysis of this structure reveals the age as one of transition.

At intervals during the millennium following its promulgation, the old Babylonian code figured in the administration of justice in Babylonia and Assyria. The Elamites seem to have carried to Susa the stele that was found in 1902,[20] and the fact that they removed five columns of the writing as though to repudiate that portion of the law suggests that they regarded the monument with more than antiquarian interest. The existence of duplicate fragments of monuments similar to the one found at Susa presents evidence of the wide use of the code in later times. The Assyrian scribes, more than a thousand years after Hammurabi, were making copies of his law and writing commentaries upon it. There are those who believe that elements of the Hammurabic law found their way into the law of the Romans. At any rate, the millennium during which the Twelve Tables were cited by Roman courts followed fast upon that during which Hammurabi's code was cited by numerous courts of Asia.

18. Actual execution in Republican Rome was by these lictors.
19. Unavoidable accidents.
20. Scholars base the assumption that Elamites defaced the stele on the fact that it was found in what had been their country.

Department's Anti-Trust Expert Appointed

Members who attended the Buffalo meeting of the Association will recall John Lord O'Brian of that city as one of the most active and indefatigable of hosts and also as one of the most pleasing speakers at the annual dinner. They will therefore be particularly interested in the announcement by Attorney General William D. Mitchell that he has been appointed Assistant to the Attorney General, in charge of anti-trust cases, succeeding Col. William J. Donovan, who retired on March 4. The announcement states that the new appointee has already represented the United States in a number of anti-trust cases, including U. S. vs. Eastman Kodak Co., U. S. vs. New Departure, U. S. vs. LaMar, Von Rintelin et al. It adds that "Mr O'Brian is a seasoned lawyer of high reputation and wide experience. He was not a candidate for the position, but has consented to accept the post at the request of the President and the Attorney General. In this respect he is like Charles Evans Hughes, Jr., who was not a candidate for the post of Solicitor General, to which he was nominated."

High Cost of Heart Balm

"Amounts sued for, as well as the judgments recovered, in marriage promise cases have tended substantially to increase during the past ten or fifteen years. In the gay '90s $10,000 was, by comparison, a very large award in a breach of promise action, and the case of Campbell vs. Arbuckle, decided in New York in 1889, in which a verdict for $45,000 was sustained, attracted wide attention both for the liberality of the verdict and because it was allowed upon the theory that the amount was 4½ per cent of the defendant's total estate. The damages claimed were $250,000. Within recent years a female plaintiff in a breach of promise case who demands less than half a million dollars for heart balm is rare indeed. And juries have rendered some very large verdicts which have been, in whole or part, sustained by the courts. About ten years ago a jury in Brooklyn awarded a disappointed woman plaintiff, 29 years old, $225,000 damages against a reluctant fiance of 84 years of age. This verdict was reduced by Justice Cropsey of the New York Supreme Court to $125,000. The wealth of the aged defendant in this case was reputed to be from $15,000,000 to $20,000,000, so the percentage rule of the Arbuckle decision was not applied."—*New York Times.*

APPOINTMENT OF OFFICIAL RECEIVERS IN BANKRUPTCY

Considerations Which Should Govern the Selection of Receivers—Erroneous Theory as to Whom They Represent—Interests of the Petitioning Creditors—Appointment of Trust Companies Not Likely to Solve Any of the Problems Involved

By Ernest J. Torregano
Member of the San Francisco Bar

THE Bankruptcy Committees of the Association of the Bar of the City of New York, and of the New York County Bar Association, are now seemingly in accord on the subject of the appointment of official receivers in bankruptcy and it has been suggested that possibly the American Bar Association may adopt the same attitude in the matter. I note the appointment in the Southern District of New York of a trust company as a standing receiver in all bankruptcy cases, and it has been suggested that like appointments of standing receivers be made in other Districts.

I gather from the news columns generally that all of this turmoil and fresh attacks upon bankruptcy administrations, culminating in these suggestions for the creation of official receivers, were occasioned by the delinquency of a certain receiver in New York who, in some manner, became a regular appointee of the Court.

The appointment of trust companies as receivers in bankruptcy would appear to indicate that the Courts have concluded that flesh and blood receivers can no longer be trusted, and that in artificial entities alone can be found the necessary attributes of incorruptibility.

The first thought which I have to advance in opposition to the creation of the office of official receiver is that the bankruptcy law and the administration thereunder should not be indicted merely because conditions as disclosed in certain jurisdictions have brought about a criticism of the administration of a bankrupt's estate.

The appointment of trust companies as official receivers would not, in my judgment, solve any of the problems which may be involved. It must be conceded, of course, that such trust companies will be required to employ ordinary humans to do the real work. It may, however, be suggested that at least such official receivers will not abscond. While I will concede that the moneys of a bankrupt's estate will find a safe resting-place in the vaults of such trust companies, I am not prepared to concede that bankruptcy administrations by such companies present other advantages over the administrations as usually conducted. Questions might be propounded to this effect: Will such trust companies render their services for less than the statutory fees, and will their attorneys seek a lower compensation than usually allowed for work of like character? I think not. In fact, it will be observed that it is proposed to double the amount of compensation to be paid to the receivers, so as to make it worth while for such trust companies to undertake the relief thought to be needed in bankruptcy administrations. Such an incentive as to compensation will undoubtedly make it necessary for other like financial institutions to take very active measures at Washington so as not to stand idly by and be excluded from this profitable business, but to undo this judicial bankruptcy legislation.

In my opinion, the bankruptcy law as presently enacted is fundamentally sound, with the possible necessity of a few procedural amendments. It must be, however, kept in mind that no law can be properly administered unless the persons who are to execute the law do so impartially and without favoritism. The error ascertained in connection with the present bankruptcy law from observation and investigation made is not by reason of any defect in the substantive phases of the law, but rather from the procedural standpoint.

It seems that the Court considers that in appointing receivers in bankruptcy the discretion placed in the Judges may be arbitrarily exercised by adopting as a policy the rejection of suggestions from creditors, the parties in interest, in naming receivers, and the naming of persons of their own choosing, even to the extent that the same individual or trust company may be appointed in every case, resulting thereby in the creation of what may be practically conceded to be an official receiver. This, in my opinion, is not a proper or sound construction of the Bankruptcy Act. It is, in fact, in my judgment, judicial legislation. It is the creation of an official office not provided for by the Bankruptcy Act.

The sections of the Act which we should have in mind in considering these questions are: Section 2 (3) and Section 3 (e). These sections may be read in conjunction with Section 69, which provides that on satisfactory proof that a bankrupt has neglected, or is neglecting, his property, the Court may issue a warrant to the Marshal to seize and hold it, but the applicant is required to give an indemnifying bond to the bankrupt in the event such seizure was wrongfully obtained. Other sections which are pertinent to this discussion are Section 30, under which the Court obtains its power to provide rules, forms, and orders, and Section 2 (15). These sections are the only provisions of the Bankruptcy Act from which the Court derives its power to make orders, issue process, and enter such judgments which are not specifically provided for in other provisions of the Act. The Supreme Court

of the United States in Meek vs. Centre County Bank, 264 U. S. 499, had occasion to recognize the importance of the limitations placed upon the Courts in the matter of the issuance of General Orders or providing rules or forms in aid of proceedings taken under the provisions of the Bankruptcy Act. In that case the Court specifically held that the exercise of such powers must not be in conflict with any of the substantive provisions of the Act, but that such powers are limited solely to procedure, and that they were not authorized to change the provisions of the substantive law. The powers of the District Court to prescribe local rules obviously flows from Section 2 (15). Such powers cannot be greater than those given to the Supreme Court under Section 30 of the Act. The orders it may make therefore concern procedural matters only.

Regulations respecting the making of the application for appointment of receivers are matters of procedure, but the question as to the necessity of the appointment of a receiver, or who is to be the receiver, is not a question of procedure—it is a matter of discretion, and the exercise thereof is a judicial act. The proper exercise of the discretion is to be determined by the facts in each case. It follows that such discretion cannot, and should not, be arbitrarily exercised. The applicant should be heard concerning the questions of the party whom the Court proposes to appoint. The Court should take into consideration the requirements of the particular case. In many instances the appointee should be a man experienced in the business he is called upon to take charge. Technical knowledge may, in some instances, be requisite. The Bankruptcy Act throughout evidences an intent upon the part of Congress that creditors, the persons who are vitally interested, should have complete charge of the administration of the bankrupt's estate, subject to the supervision of the Court. Any attempt to do away with that important feature of the Bankruptcy Act must necessarily create an unsatisfactory result. The difficulty with the whole question of receiverships has been on account of the erroneous theory of the Judges that the receiver is their own representative and that therefore, such a responsibility being imposed upon them, the appointee must be a friend of the Judge or if not, his appointment is brought about by some influence other than that of the creditors.

A brief resumé of the important steps in an involuntary proceeding, which is a case where receivers are more frequently required, as it should be seldom necessary for the appointment of a receiver in a voluntary case, clearly indicates that a contrary view should prevail. Upon the filing of an involuntary petition, if a receiver prior to adjudication is desired, the petitioning creditors are required to assert that it is absolutely necessary for the preservation of the estate that such receiver be appointed forthwith. They are required to post a petitioning creditors' bond. The petitioning creditors in putting up such a bond assume all the risk for the benefit of all the creditors, yet if they fail to sustain their proceedings they have no recourse against any creditor for contribution, if held liable under such bond. It seems manifest to me that with such responsibility upon the petitioning creditors and not upon the Judge, the Court should be more careful in naming the person for whose acts such creditors may become liable, if the person appointed proves incompetent and causes damage for which the petitioning creditors must pay. It is therefore submitted that the petitioning creditors, and not the Judge, should be entitled to name the receiver who is to be appointed, subject, of course, to the Judge's disapproving of their selection for good cause shown but again permitting them to suggest another person until one is finally approved of and appointed by the Judge.

Bankruptcy proceedings must be regarded as civil proceedings with two parties, the bankrupt on one side and his creditors on the other side. Therefore, a proper solution of any of the abuses which have grown up in the administration of the bankruptcy law may be found not in an attempt to take away from the creditors the control of the administration of their debtor's assets, but conversely the responsibility should be entirely shifted to them, including the choice of the person who is to administer the assets and the expenses incurred during such administration.

The provisions of Section 2 (3) are very plain that receivers should be appointed only when absolutely necessary. If these provisions are strictly enforced the abuses complained of will mostly vanish. Receivers are frequently appointed where only a custodian is needed or where an order placing the United States Marshal in charge of the property until the creditors choose a trustee would be proper.

In line with my suggestion that the person appointed receiver, when necessary, should be named by the petitioning creditors, the persons who have initiated the proceedings and therefore obviously most interested, there is one improvement which can be made so as to safeguard the interests of others, and that is that the petitioning creditors' bond, when posted, should not stand only as an indemnity to the bankrupt, but also to his estate in bankruptcy or any of the creditors thereof, for losses or damages which might be sustained by reason of a collusive receivership proceeding. The details of such legislation need not be dwelt upon. It is a matter of phraseology of the Statute so that indemnity may accrue to all the persons who may be injured, and not only restricted to the bankrupt, who probably may be acting in a collusive arrangement with certain petitioning creditors and therefore would not involve them or their surety in any liability.

The suggestion of an official receiver, I observe, contemplates that all trustees shall be done away with, and that upon the filing of a petition the receiver shall forthwith be appointed. I am at loss to understand how this suggestion is helpful, as the Bankruptcy Act now provides that an affirmative showing must be made that it is absolutely necessary for the appointment of a receiver. The present suggestion would do away with the necessity of such showing, but would immediately tax upon the assets of the bankrupt, which would ordinarily be subject to distribution to creditors, this double compensation, so as to make the job attractive to proper institutions or persons. In my opinion, the only way efficiency can be obtained in the administration of a bankrupt's estate, either through a receiver or a trustee, is by reason of the interest which the parties have in bringing about a successful administration. The fact that the job

is attractive to proper institutions or persons will not solve the problem. In fact, in my opinion, it would tend to burden the estate with unwarranted expenses on account of the clerical, auditing, and legal staff which would be maintained by these institutions or persons, requiring them to impose an assessment against each estate, even though the service was not necessarily in the administration, to defray the expenses of a large staff, whereas the creditors' representative, if properly inducted into office, can bring about an administration upon a more economical basis. The official receiver would not lessen the opportunity for corruption, but indeed, would invite greater temptation. It is a fact that where there have been professional receivers or official auctioneers, notwithstanding the honesty and integrity of the Judge appointing such persons, charges of graft have been repeatedly made against these receivers and auctioneers so appointed and in some instances, as investigations have disclosed, properly sustained.

It may be argued in favor of the official receivership plan proposed that such a system is now in operation in England and is apparently successful. However, in that connection, it must be observed that a system which may work successfully in England might not work so successfully in our vast and scattered domain. The English Act provides for the election of a trustee, if the creditors so determine; otherwise the estate is administered by an official receiver. A committee of inspection is provided, the members of which, as well as the official receivers, are appointed by, and subject to the orders of, the Board of Trade, with the approval of the treasury. We have no such official body as the Board of Trade referred to. Obviously a check or supervision over official receivers in England is provided for, and if such a system is adopted in this country a similar check would be required, creating additional charges and expenses in the administration of insolvent estates. The system proposed requires complete reconstruction of the Bankruptcy Act, and I do not believe that the merchants, credit men, or other trade organizations, are willing to sacrifice the present Bankruptcy Act for an experiment. The Act has stood the test and has proven itself a workable Statute. The deficiency, if any, cannot be attributed to the Statute itself, but rather to persons who have been recalcitrant in the discharge of their duties.

This is a matter which should not be influenced by public agitation. It is legislative in nature, to be approached only after an exhaustive, fact-finding investigation.

Imagine the value of the position of an official receiver in New York City. Under the present Act the Courts may allow the receiver the same compensation as allowed to the Trustee, and where a business is conducted the compensation may be doubled, and the receiver's compensation may be based on the total value of the assets as realized upon by the subsequent trustee. Statistics for 1927 for the Southern District of New York show a total amount realized in bankruptcy estates of $18,539,737.85. Of that amount there was paid to attorneys $1,640,984.81. In a jurisdiction where appointment of receivers is the rule rather than the exception, the magnitude of the fees which would flow to the attorneys and the official receivers is staggering.

It is my opinion that the propositions involved in the suggestion of official receivers are of such momentous importance that they require more than a hasty deliberation upon the part of any organization or individual, and therefore, notwithstanding the alarm which apparently is indicated, the matter should be proceeded with in a calm and orderly way in order to obtain the results desired.

Bureau of Audit and Investigation

The suggestion of the creation of a Bureau of Audit and Investigation to determine from an accounting standpoint whether bankrupts have made a full and complete disclosure of their property is a good suggestion, providing that it is not to be an expense taxed against the assets which would otherwise be distributed to creditors. This is for the same reason that I have heretofore pointed out. The creditors should have control of the disposition of the bankrupt's estate and the incurring of any expenses in connection therewith, and while it is true in some cases where a gross fraud has been perpetrated an audit and an accounting are not only desirable, but necessary, that should be left to the decision of the creditors or the trustee representing and appointed by them. If, on the other hand, the Government desires to create this Bureau and either have appropriation made by Congress for the maintenance thereof or add to the amount of the filing fee, so that in addition to the Clerk's, Referee's, and trustee's fee there shall be also available out of the filing fee an amount to be applied towards the maintenance of this Bureau, I see no objection.

Referee Upon a Salary Basis

The placing of a Referee upon a salary basis may or may not be appropriate. In my judgment, it is impractical unless the salary of the Referee is predicated upon a population basis, because, as we know, in some instances Referees have more cases than others, depending upon the extent of their territorial jurisdiction, or possibly the commercial activity therein. However, as an alternative, it might be desirable that the filing fees (both statutory and claims filing fee) allowed to the Referee from bankrupt estates should be increased and the commissions paid to him should not be restricted solely to distribution made to creditors. The intention of the last restriction was obviously to compel the Referee to distribute to creditors rather than to pay large attorneys' fees. However, it cannot be said that this restriction is ironclad, because many schemes could be engineered between the attorney and the Referee to make that provision nugatory. If a Referee is dishonest, he can make more money by distributing a large portion of the estate to an attorney and dividing up the fees with that attorney. I, for one, am not ready to subscribe to any intimation that Referees generally are not upright, honest, and scrupulous men of the highest integrity, dealing in many instances with large problems in the administration of a debtor's estate and conscientiously discharging their duties. As a matter of fact, in the last recommendation that I made to the Bankruptcy Committee I ventured certain suggestions whereby I submitted that it is

desirable that the Referee's powers should be enlarged so as to bring about what Congress really intended—an equitable determination of the rights of creditors, or any persons dealing with the assets of the bankrupt's estate, without the necessity of long, tedious, technical, and sometimes dilatory proceedings which may be availed of in plenary actions, and sometimes costly to creditors.

In conclusion I will state that economic conditions and the credit situations inevitably will always force recourse to the bankruptcy law and the machinery of the Bankruptcy Court. It is therefore desirable that we should attempt to make it as efficient and progressive as we possibly can, but to expect 100% efficiency is, as in the case of all other human agencies, impossible.

WRESTLING WITH THE INTERNATIONAL TELEGRAPH CODE

By HOWARD S. LEROY
Member of Washington, D. C., Bar

THE International Telegraph Conference of 1928 convened at Brussels on September 10, 1928, with delegates representing fifty-two administrations adhering to the International Telegraph Convention and Regulations. The principal task before the Conference was action upon the report of the Cortina Committee for the study of Code Language. Codes have been used increasingly from the earliest days of telegraphic communication to achieve secrecy and economy. Major William F. Friedman, the recognized American code expert, has prepared an authoritative *Report on the History of the Use of Codes and Code Language* (United States Government Printing Office, Washington, 1928). Action by the Conference involved an international legislative function comparable in some respects to rate making as carried on by the Interstate Commerce Commission and other regulatory bodies under our municipal law.

The difficulties in the realm of international communications arose by reason of the conflict of divergent interests. The large users of telegraphic communication and the code makers were from the beginning intent upon compressing a maximum amount of information into a minimum number of letters. At first, the basis of code language comprised actual words used with a meaning other than the usual dictionary meaning. The dictionary code, however, developed disadvantages, causing it to be supplanted by codes composed of artificial words. The use of artificial words with unfamiliar combinations of letters caused operating difficulties in accurate and rapid transmission. The companies operating electrical communication services found it necessary to limit the types of words acceptable for transmission. At the time of the International Telegraph Conference of Paris in 1925 the regulations restricted the construction of code language to the use of actual or artificial words of not more than ten letters. The ten-letter words also had to be composed of syllables pronounceable in one of the following languages: German, English, Spanish, French, Dutch, Italian, Portuguese or Latin. (International Telegraph Regulations Art. 9 Paris Revision.) Code compilers taking advantage of the possibilities of these limitations had replaced the ten-letter codes with five-letter codes. This permitted the combination of two five-letter words for transmission at the cost of one ten-letter word.

The early five-letter codes were brief, with combinations easily pronounceable, facilitating accurate and rapid transmission. A demand for more comprehensive and specialized codes grew with increased use of electrical communications. The result was increasingly unwieldly code books containing impossible combinations. At the same time the keen competition between operating companies prevented a strict application of the pronounceability rule. In view of these operating difficulties the governmental administrations and the operating companies at the Paris Conference set out to limit code words to five letters irrespective of pronounceability.

This broad conflict of interests between operators and users made it impossible to reach a settlement in the Conference and resulted in the Report of the Cortina Committee:

The Cortina Report contained two sets of recommendations. The majority proposal was signed by fourteen delegates. The minority proposal presented the views of the British Delegation. The majority recommended that Code words should be composed of a maximum of five letters selected at the sender's will without any condition. The minority or British view favored the continued use of the ten-letter code word with certain changes calculated to correct abuses. The Committee, unable to agree, left the question for decision by the International Radiotelegraph Conference at Washington in 1927. (Article by writer, AMERICAN BAR ASSOCIATION JOURNAL, February, 1928).

The Washington Conference, even under the masterly guidance of President Hoover, then Secretary of Commerce, found the question of action on the Cortina Report so thorny that the whole problem was passed along to the Brussels Telegraph Conference of 1928. This postponement materially changed the relation of the United States to the situation. This country, while a member of the International Radiotelegraph Union, is not a member of the Telegraph Union. This gave the able American Delegation merely unofficial standing, without the right to vote, at the Brussels Conference. The Delegation included the Honorable Leland Harrison, American Minister to Sweden and former

Assistant Secretary of State, charged with handling of communications matters; Mr. John Goldhammer, Vice-President of the Commercial Cable Company, representing the operators of both cable and radio communications; and Mr. Charles Henry Shedd of Chicago, representing the users of cable facilities.

The Delegation was supported by a thoroughly competent staff of technical advisers and experts, including:

William R. Vallance, Assistant to the Solicitor, Department of State, expert on Communications and member of the American Delegation to International Radiotelegraph Conference.

Major Wm. F. Friedman, Chief of Code and Cipher Section, War Department.

Lieutenant Webster, United States Coast Guard.

Harry F. Coulter, Chief of International Accounts Section, Radio Division, Department of Commerce.

Carl O. Pancake of the Guaranty Trust Company.

Ernest Petersen of the Petersen Code and Cipher Company.

After a long series of discussions in which the private companies expressed their views as well as the national delegations, a compromise proposal was put to a vote and adopted by a vote of 47 to 4 with 3 abstentions. It provided two systems of code language at the option of the users, as follows:

(A) Telegrams formed of words not including more than ten letters and classified in one of the following two classes:

1. Bona fide words belonging to one of the eight languages.

2. Artificial words including at least one vowel if they are composed of a maximum of five letters, two vowels if they are composed of 6, 7, or 8 letters, and three vowels if they have 9 or 10 letters.

(B) Telegrams formed of words not containing more than five letters without any condition or restriction.

As to tariffs, it was proposed that the full unit charge should apply to words of Category A, and that a unit charge equal to two-thirds of the full charge should apply to telegrams of Category B.

The next International Telegraph Conference will assemble at Madrid in 1932.

The following points are of general interest in connection with the work of the Conference. The American cable and radio companies, in spite of their great rivalry, joined in a single proposal to the Brussels Conference, and were consequently treated as a unit.

One of the most controversial points growing out of the Conference is whether plain language can be chopped up into groups of five letters and sent under Category B. The companies do not seem to agree on this point. There has been some suggestion that when October 1st arrives the American companies will continue the present system without change.

It is also quite possible that the Brussels Protocol might not become effective October 1st, by reason of failure of some countries to ratify. In that event, the whole matter would remain in status quo until 1932.

The whole problem is bound to arise again at Madrid with much depending upon the results of the Paris compromise and the activities of the code makers. Reduced to its simplest terms the question is one of international rate making by an international legislative body with the lines closely drawn between the governmental administrations on the one hand and the large users constituting international business on the other hand. Two facts may be significant with respect to the ultimate solution. First, international business with a very small voting representation produced a deadlock at Paris in 1925 and at Washington in 1927, and forced a compromise at Brussels in 1928. Second, the pronounced world trend toward concentration of economic units operating in the international field with almost unlimited resources means a tremendous increase in the demand for accurate and rapid international communications. At Madrid in 1932 the voice of international business will be even more insistent and influential—irrespective of votes.

Proposed Limitations Upon Our Federal Courts

(*Continued from page 406*)

which attracted the praise of Blackstone and of our ancestors, but something novel, modern and much less to be respected."

The authorities are legion to the effect that this power of the trial judge to comment upon the facts was one of the essential attributes, one of the fundamental incidents of trial by jury at common law. Turning to our Federal Constitution we find the provision that the right to trial by jury "shall be preserved . . . according to the rules of common law." That the right to trial by jury in the Federal courts is secured by the Constitution admits of no doubt. Perhaps it is more accurate to say that the Constitution appears to have preserved the substance of the fundamental incidents of trial by jury as known at common law, one of the essential attributes of which is the power of the trial judge to advise the jury concerning the evidence. And, indeed, the United States Supreme Court has on various occasions stated that the adoption of our Constitution did not take away the incidents of trial by jury known in England at the time of its adoption, and that among these incidents is the power of the judge to comment upon the evidence. Mr. Justice Gray, in delivering the opinion of the United States Supreme Court in *Capital Traction Company* vs. *Hof*, gave expression to these matters as follows:

"Trial by jury in the primary and usual sense of the term at the common law, and in the American Constitution, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and impannelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution, but it is a trial by a jury of twelve men *in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts.*"

It is true that in *Walker* v. *Southern Pacific* the Supreme Court held that the constitutional provisions did not preserve the form or procedure of the trial by jury as it existed at common law, but the statute under consideration was concerned only with the procedural and not with the substantive part of trial by jury. In the case of *Thompson* v. *Utah*, the Supreme Court, speaking through Mr. Justice Harlan, said:

"It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the *meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.*"

Finally, in the case of *Nudd* v. *Burrows*, the Supreme Court of the United States held that a statute of Illinois relating to trial by jury which did not relate to a matter of practice, but rather to one of substance, was not binding upon the Federal court. While the precise question as to whether Congress can constitutionally deprive Federal judges of the power to comment upon the

evidence has never been determined, it seems to me, in view of the decisions I have referred to, it has been strongly intimated that, in the opinion of the Supreme Court, the power of a Federal judge to comment upon the evidence is an essential attribute—a matter pertaining to the substance rather than to the form or procedure—of trial by jury as it existed at common law at the time of the adoption of our Constitution, and that as such the Constitution has placed it beyond the reach of Congressional interference. In addition to the Federal courts, there are but ten states in the country that permit their trial judges to comment upon the evidence. In the other 38 states, the judge has been deprived of this power by constitutional provision, statute or judicial decision. The process of depriving state judges of this power had its inception in a statute passed by the North Carolina legislature in 1796, which was the result of a bitter feud existing in that State between bench and bar. Time does not permit me this evening to trace in detail the gradual process whereby this type of restrictive legislation spread to other states during the ensuing years. This matter has been admirably handled by Mr. George Hogan, in an address entitled "The Strangled Judge" which he delivered as President of the Vermont Bar Association, in January of this year. After considering in detail the various causes for the enactment of these strangling statutes in the various states, Mr. Hogan's conclusion is that a thorough review of the whole subject

"clearly reveals the fact that the power of the courts to comment on the testimony was taken away, not as a result of a careful study of judicial procedure, but as the result (1) of personal bickerings and spite; (2) of a lazy copying of neighboring constitutions, statutes and decisions; and (3) of distrust of the people in the personnel of their judges during the pioneer and wartime era. But with the vast improvement in the stability and progress of these southern and western states, and with the resulting improvement in the caliber of the trial judge, to distrust him is no longer justified. The simple truth is that the strangling rule has been allowed to remain so long on the statute books of these states that it has created a stagnant attitude of mind on the subject."

The mere fact that in a majority of our state courts the trial judge is muzzled and prevented from advising the jury on the evidence is neither reason nor justification for placing similar restrictions on Federal judges; indeed, on the contrary, it seems to me that the sad effect which these strangling statutes have had upon the system of trial by jury in many of our state courts, is itself a strong argument against depriving our Federal judges of this right to comment upon the facts. That the American jury system is not in a healthy condition in many of our states cannot, I think, well be denied. In numerous sections of the country people are beginning to lose confidence in the modern jury system as a means of impartially administering justice. The handwriting is already beginning to appear upon the wall, and signs of a growing discontent with the jury system are not wanting. It is my firm opinion that this present day lack of respect for, and confidence in, the jury system as a fair means of administering justice is, in no small measure, due to the fact that in the great majority of our trial courts in this county these "strangling statutes" have forced the trial judge to assume the rather humiliating position of a mere figurehead or a colorless moderator.

I believe, as Mr. Hogan has stated, that:

"The public is getting impatient with the jury trial where the presiding justice is present but takes no part; where money and time are wasted in drawing a panel; where opposing counsel stage a game of emotional prejudice; where exclusionary rules of evidence prevent a witness from telling what he knows; where senseless technicalities obstruct; where juries are bewildered; and where justice miscarries."

Such a state of affairs did not exist at common law. It does not exist in our Federal courts today. Permitting the judge to comment upon the evidence and to caution and advise the jury when complex and difficult matters of testimony are presented makes for quicker verdicts, fewer disagreements and a lessening of the danger of reversible error. To deprive the judge of this power would be a step backward, rather than a step forward, in the gradual process of reforming judicial procedure. As stated by Mr. Justice Sutherland, in his address to the American Bar Association in 1912, when we refuse to permit an experienced judge to comment upon the testimony, "it is as though we should drive all the architects and builders into exile and construct wigwams for ourselves."

To see that the facts are ascertained and made clear rather than submerged and obscured; that the law is honestly and fearlessly applied to such facts, and that no unfair advantage is taken by any party or his lawyer—this, I submit, is the supreme function of the presiding judge in the institution of trial by jury. Unless Federal judges are allowed to continue to perform this highly important function, it is my conviction that trial by jury in the Federal courts is bound to degenerate and that in time it will become a rather tragic exhibition of what has been regarded by the English speaking people for centuries as the most practical and impartial method of administering justice.

Harry Sanger Richards

Harry Sanger Richards, Dean of the Law School of the University of Wisconsin, and a member of the American Bar Association since 1899, died in Boston, Massachusetts, April 21, while in attendance at a conference of the Advisers of the Restatement of the Law of Agency for the American Law Institute. He was born at Osceola, Iowa, November 10, 1868. He graduated from the University of Iowa in 1892, and from the Harvard Law School, cum laude, in 1895. After three years of practice at St. Louis and at Ottumwa, Iowa, he became a member of the faculty of the Law School of the University of Iowa.

In 1903, he became Dean of the Law School of the University of Wisconsin. During his term of service as dean of that school, it developed from a school of medium standards to one of the leading schools of the country. Under his guidance it had just put into effect entrance requirements of three years of college. His work at Wisconsin, combined with his recognized ability as a law teacher and administrator, made him one of the leaders in the Association of American Law Schools, of which he was President from 1914 to 1915.

He became a member of the American Bar Association as soon as he was eligible under the then provisions of the Constitution. Only a few of the present members of the Association antedate his membership. He was active in the Association and had attended

most of its meetings since he became a member. He was chairman of the Section of Legal Education from 1908 to 1909. He was a Commissioner on Uniform State Laws from Wisconsin, since 1924, and was most active in the work of the Conference. He was a member of the American Law Institute and one of its Advisers on Agency and Business Associations.

During the World War he was Chief of the Editorial Division of the Intelligence Bureau of the War Trade Board.

He was a member of Phi Delta Phi law fraternity and of Phi Beta Kappa and of the Order of the Coif. He had the degree of LL.D., honoris causa, from the University of Iowa.

He is survived by his widow and his son, John W., an attorney of Madison, Wisconsin.

Dean Richards was a leader both in legal scholarship and in law school administration. His personality and his keen wit made him popular with lawyers who came in contact with him and he had a host of friends throughout the country. His death is a severe loss not only to the school of which he was dean, but to the legal profession.

New York Supreme Court Adopts Important Rules

OUTRAGEOUS practices in connection with negligence cases, uncovered in the recent ambulance-chasing investigation made in New York City, are expected to be largely wiped out by a set of rules regulating the conduct of lawyers recently adopted by the Justices of the Appellate Division in the First Judicial Department, says the New York State Bar Association Bulletin, quoting from the New York Law Journal.

Eleven rules have been adopted by the Justices, the first three of which forbid the solicitation of cases, champerty and maintenance, and apply to all classes of actions and special proceedings, including criminal cases, bankruptcies, and condemnation proceedings, about which "there has been a suspicion of scandal which also must be eradicated for the preservation of the good name of the profession."

The remaining rules apply only in connection with claims or actions for damages for personal injuries or for death or loss of services resulting from personal injuries. Their target, it is obvious from a reading of the rules, is the entire "ambulance chasing" system, the employment or use of "lead men" and runners, group settlements of claims, the sending of investigators to interview the adverse party, and other abuses long known to exist, but thrown into the limelight by recent investigations in New York and other cities. High hopes are held for the effectiveness of the rules adopted in correcting these conditions, according to the Bulletin's quotation from the New York Law Journal.

The first of the rules applying to personal injury cases requires that any lawyer making a contingent fee agreement must file a written statement of such agreement with the clerk of the First Judicial Department. The same rule also provides: "No attorney shall accept or act under any written retainer or agreement for compensation in which the name of the attorney is left in blank at the time of its execution." This provision is aimed at the practice of accepting the services of the free-lance runner, a person who, upon information of an accident given by "lead men" employed by himself, hurries to the injured party, obtains a power of attorney signed in blank, and then sells the claim to the highest bidder among the law offices. The Philadelphia Bar investigation revealed that there were at least 200 members of this "profession" in that city, and the number in New York is assuredly considerably higher.

Funds collected by any attorney, says Rule IV-B, in any personal injury claim, "either by way of settlement or after a trial," must be deposited in a bank or trust company and not commingled with the lawyer's own funds. Within ten days such sum must be paid to the client, accompanied by a statement of the amount received, the date, and the amount claimed for services, which amount may be deducted from the funds. Careful provisions are added for the payment of the funds of infant clients to the guardians, for assuring the client the right to petition the court to pass upon the compensation deducted by the lawyer, and for payment into the city treasury where the lawyer cannot find his client.

Rule IV seeks to protect infants having personal injury claims from unfair settlements, and provides that upon application for the court's approval of a settlement of such a claim, where neither the infant claimant nor his guardian are represented by counsel, written notice shall be given the infant and guardian, and the court may, in its discretion, appoint a special guardian or attorney or designate an official referee to examine the reasonableness of the proposed settlement. "No attorney," the rule adds, "shall directly or indirectly participate in or consent to the disregard or violation of any provision of statute or rule requiring security to be given by guardians ad litem and special guardians of infants."

The abuse of group settlements, exposed and condemned in both the New York and the Philadelphia investigations, is the target of Rule IV-D. By this practice, a lawyer holding a large number of claims against one defendant, or against defendants insured by one company, confers with the claim agent of the company, and after many hours and perhaps days of haggling, a lump sum is agreed upon to cover all the cases. This sum the lawyer then spreads over his clients' demands, making it go as far as possible, and obliging those most easily influenced to accept what he is disposed to apportion to them.

Rule IV-D meets this abuse by forbidding any lawyer for a claimant or plaintiff to group two or more such claims for the purpose of settlement, and providing that "each such demand or action shall be settled or compromised independently upon its own merits and with regard to the individual interests of the client." Defense attorneys are also forbidden to participate in such group settlements.

Communication by an attorney with the adverse party, whether plaintiff or defendant, "known by him to be represented by attorney without the latter's knowledge and consent," is forbidden by Rule IV-E, as is also the practice of permitting a representative or agent of his client to interview the adverse party in order to obtain a statement

or settlement with the latter, without the knowledge and consent of his attorney.

Pleadings and other papers concerning the disposition of all personal injury claims and causes shall be preserved for a period of five years after final disposition of the claim, by attorneys for both parties, Rule IV-F requires. Rule IV-G provides that any lawyer violating any of these rules shall be guilty of professional misconduct within the meaning of the Judiciary Law.

Comprehensive powers to investigate the practices and conduct of lawyers suspected of being engaged in objectionable practices in personal injury cases, is given to the Supreme Court at Special Term, upon application of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, or any of them, or upon motion of the Appellate Division. Such investigation, Rule IV-H provides, "may extend to all persons engaged by or with any such attorneys in such practices as their agents, servants, employees, representatives, runners, investigators or by whatever name they may be called, and also any persons who have or may have procured or induced or solicited the placing of claims in the hands of such attorneys or been parties thereto." Equally wide jurisdiction is given as to the types of practices affected.

At the close of any such investigation, the court may from time to time report its proceedings to the Appellate Division, with its opinions and recommendations.

LETTERS OF INTEREST TO THE PROFESSION

The Practicing Lawyer in Business

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

In the June issue of the JOURNAL appears the statement of the Committee on Professional Ethics of the New York County Lawyers Association, in which the committee indicates that it does not consider it unethical for a lawyer while in active practice to engage in business. The particular question before the committee related to a group of lawyers entering the field of investment bankers. The committee approved.

In the same issue of the JOURNAL is a summary of a review of the Carnegie Foundation which intimates that standards of admission are growing stricter.

The action of the committee of the New York County Lawyers Association seems to undo any raising of standards of admission.

I recently came across a member of the New York Bar who lends money on second mortgages and takes the loans in his wife's name. His charges are worked out as follows:

1. 10% to 25% commission for placing the mortgage.
2. A charge for examining title, that is, a title company's report.
3. The usual lawyer's commission from the title company for ordering the examination.
4. A charge for drawing the bond and mortgage.
5. A charge for examining insurance policies.
6. A share of the broker's commission on the insurance policies.

Can the committee distinguish between the functions which this man performs?

There seems to be growing the custom for certain types of lawyers to exact a share of the commission earned by a real estate broker in selling or leasing property of the lawyer's client, and also to exact a share of the commission on insurance policies placed on the client's properties.

Will not the action of the committee open the legal profession to more abuse than that which it is now getting? Does the committee approve of a lawyer engaging in the loan shark business? That is investment banking—only it deals with a type of banking which has been a curse for ages and has never been adequately controlled.

A lawyer is an officer of the Court bound by an oath to promote justice. He should be held to a high standard of education, training and conduct in return for the privileges and standing which are given to him. As a business man he is free from the obligations of an officer of the Court and his conduct is not governed by standards commensurate with the privilege and standing. In a conflict between the two it is human nature for personal gain to influence the lawyer in determining which standard shall govern his conduct.

The committee says: "There is not in this country any accepted standard of professional propriety which warrants condemnation of a lawyer for engaging in business". It is time there was an accepted standard. The action of the committee merely makes it more difficult ever to establish any standard at all. Would it not be better to follow the example of the English Bar which does not permit a lawyer to have a double allegiance?

New York City, June 4. JOHN R. LAZENBY.

The Young Lawyer's Reaction to Higher Standards

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

In your current June issue, an article appears giving reasons for joining the American Bar Association. It gave me real pleasure to read it.

Permit me to indulge in some comment based on my observation among law students and young lawyers. It is my good fortune to hold a position of inspector of one of our national law fraternities and through that work I have come in contact with a large number of law students and young lawyers in the middle west. These contacts have necessarily brought discussions and opinions of the problems confronting the prospective and young lawyer. We are requested frequently to advise them on items which are brought to our attention.

Among the questions asked is "What is the American Bar Association doing for the young lawyer?" And similar questions with reference to State Bar Associations are asked.

It might be interesting to you to know some of the reactions among the rank and file of the young lawyers. Some admit the value of the Association's work in urging the increase in the qualifications for admission to practice and the higher standards being adopted. Some agree that the old Lincoln argument often used against higher requirements is untenable. I have noted, however, a great amount of criticism of the lack of a program to coordinate the movement for higher admission requirements.

The trend of the criticism is this: If the young lawyer is to be required to make more thorough and better preparation, some agency should be developed to see to it that he is not lost to the profession by reason of unfortunate financial or local circumstances. In other words, he should not be compelled to submit to a "survival of the fittest" contest because of a lack of means to sustain him over the "traditional starvation period" and be thus handicapped in competing on a basis of ability. Generally, the young lawyer is not afraid of competition on the basis of ability; however, there seems to be a great number who, by reason of the higher admission standards, enter the profession under a real financial handicap. No available agency is at hand to place these men of ability and thus sustain them over the naturally "lean years." He must locate himself and if he does not find an individual lawyer willing to "take him in", he must fight the battle alone, burdened by the increased debt over his head caused by longer preparatory requirements.

During these criticisms, reminder has been given that the various law schools offer to secure locations for their graduates, but I am informed that practically this is not true. The effort, if made at all, is merely perfunctory, generally, and actively confined to those who received high grades.

My experience has been that many young men, after realizing the imperfect arrangement while requiring so much, either leave the law school before completing the course or never practice, or practice a few years and then leave the profession, they being unwilling to continue the sacrifice which has been their portion during the preparatory period when no active effort is apparently made to welcome them and keep them in the profession. "The injustice of it," remarked one lawyer, "is in dropping us after we meet every requirement for high efficiency preparation. Unless, we happen to have an avenue already available for entering the profession, or have sufficient financial backing, we are piously permitted to go."

To these young men, a membership fee is not nominal. They need to watch every corner. Every expense is cut off which does not bring a definite return. They would like to have the advantages of the American Bar Association and their State Bar Associations but the combined fees prohibit under their status. Five dollars or ten dollars is a large fee in many instances.

This criticism is not alone confined to the rank and file. Nor is it limited to those who do not "inherit" professional connections in some manner. The question comes to me many times, "What practical effort is being made by the organized profession to take care of its young members and to prevent the loss of their high ability to the Bar?"

Personally, I would have considered my personal experiences in the light of my own limitations had not my contacts mentioned shown me that the experience is rather universal among the ordinary rank and file. Perhaps, our young lawyers have the wrong view; perhaps, they are a bit too anxious. However, no one can question their loyalty to the profession and their sincere adherence to its ideals and ethics. If, perchance, some are found to indulge in the practice of unethical methods, it is not from choice but rather the old story of being forced to forget their resolutions in order to survive. I have pondered whether

or not our lack of active attention to the young lawyer through cooperation with him has not produced the harvest of improper practices which is so pointedly mentioned on page 325 of your June issue, with the resultant popular reaction against the legal profession which magnifies the shyster and other unfortunate terms hurled at the lawyer, and forgets the valuable service which he renders.

If I have mentioned a situation which proves interesting to you, I would be glad to amplify it at your suggestion. If, by reason of my few years in the profession, I have not been sufficiently informed of activities in behalf of the young lawyer, I shall be greatly pleased to be so advised.

Douds, Iowa, May 29. A. L. DOUDS, JR.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Georgia

Georgia Bar for More Stringent Admission Requirements

The 46th Annual Session of the Georgia Bar Association was held at the Biltmore Hotel, Atlanta, Georgia, from May 30th to June 1st. The meeting was presided over by Ex-Governor John M. Slaton, President of the Association.

On the first day Governor Slaton delivered the President's Address, taking as his subject "Constancy as Viewed by a Georgia Lawyer."

The Annual Speaker of the Association was the Honorable James M. Beck, Member of Congress from Pennsylvania, who, on May 31st, addressed the Association on "The Centennial Anniversary of a Great Debate," in which he discussed in scholarly and eloquent fashion the Haynes-Webster debate of a century ago, and interpreted the issues then before the country in their relation to present day conditions.

Papers were read by the following: "The Southern Circuit—A Sketch," by J. N. Talley, Referee in Bankruptcy of the Macon Division of the Middle District of Georgia; "The Practice of Law by Corporations and Other Lay Interests," by E. Smythe Gambrell of the Atlanta Bar; "Crime Waves," by W. F. Jenkins of the Court of Appeals of Georgia; "The World Does Move," by Justice S. Price Gilbert of the Supreme Court of Georgia.

The Association considered, for the third time consecutively, the question of the Incorporation of the Bar, and determined that for the present the plan to incorporate the Bar would be abandoned and that the Association should concentrate its efforts on more stringent regulations governing admission to the Bar, and take steps to present to the 1929 Session of the General Assembly of Georgia appropriate measures to that end.

The social features of the session were a barbecue tendered to the Association by Governor Slaton, at the Druid Hills Club, and a reception given by Mr. Robert Alston, of Atlanta, to Mr. Beck, the annual speaker. The hospitality of Atlanta, the Atlanta Bar and the Atlanta Lawyers Club was most generous, and was highly appreciated.

The Association increased its membership by approximately 250 members, so that at the present time more than fifty per cent of the active practicing lawyers in Georgia are members of the Association. Credit for this increased membership is due to the activity of the Treasurer of the Association, Mr. Logan Bleckley, of Atlanta.

The attendance at the 1929 session of the Association was the largest in its history, due in part to the meeting of the Association being held in Atlanta, where the Association met for the first time in many years; but the attendance generally throughout the state was larger than in previous years.

The Georgia Bar Association is most active, and probably wields greater influence at the present time than at any other time in its history.

The following officers were elected: Joseph E. Pottle, President, Milledgeville; Rembert Marshall, 1st Vice President, Atlanta; Logan Bleckley, Treasurer, Atlanta; H. F. Lawson, Secretary, Hawkinsville.

District Vice Presidents: 1st District, W. W. Douglas, Savannah; 2nd, J. H. Tipton, Sylvester; 3rd, T. O. Marshall, Americus; 4th, Buford Boykin, Carrollton; 5th, Rembert Marshall, Atlanta; 6th, W. E. Watkins, Jackson; 7th, Eugene S. Taylor, Summerville; 8th, Miles W. Lewis, Greensboro; 9th, A. C. Wheeler, Gainesville; 10th, H. C. Hatcher, Waynesboro; 11th, E. Kontz, Bennett, Waycross; 12th, Grayson C. Powell, Swainsboro.

Executive Committee: John B. Harris, Chairman, Macon; Alex W. Smith, Jr., Atlanta; D. S. Atkinson, Savannah; W. W. Mundy, Cedartown.

H. F. LAWSON, Secretary.

Colorado

Newspaper Attitude Towards Lawyers

At the annual meeting of the Denver Bar Association, the following new officers (who assume the reins July first next) were elected: Hon. John H. Denison, President; Ernest L. Rhoads, First Vice President; George P. Winters, Second Vice President, and Ira C. Rothgerber and Robert E. More, Trustees. With such an official staff, headed by the distinguished and well-beloved Judge Denison, the Association looks forward with confidence to continued activity and accomplishment during the coming administrative year.

The May meeting, held at the Chamber of Commerce on May sixth, was addressed by S. Arthur Henry and Lee Taylor Casey. Mr. Henry, one of the younger members of the Bar and a member of the Legislature, discussed entertainingly and humorously the achievements, positive and negative, of the recent legislative session. Mr. Casey, introduced by President Toll as "the Heywood Broun of Colorado," is a brilliant editorial writer and columnist on The Rocky Mountain News, Denver's morning newspaper. He discussed "the Newspaper Man's Attitude Toward Lawyers."

Mr. Casey thought the tendency to try cases in the newspapers peculiarly true of Denver and that the lawyers were in a measure to blame for the situation. If the newspapers knew precisely what the Bar expected of them, they, or at least his paper, he thought, would cooperate in suppressing the abuse. District attorneys were partly responsible, he said, in announcing their theories of cases in advance of trials. He cited specific instances of prejudice created during the course of criminal trials by newspaper discussion, resulting, he thought, in a miscarriage of justice. The burden of Mr. Casey's song was to the effect that if the newspaper man could get the lawyer's point of view and the lawyer could get the newspaper man's point of view, cooperation between press and Bar would be much more effective. The general reaction among the lawyers was that Mr. Casey's talk was decidedly worth-while and that the discussion which he commenced could be extended with mutual profit in the future.

N. B.: The governor did veto the judicial salary increases for the district

judges as well as for the members of the Supreme Court. But two years hence, we will have a different story to tell.

JOSEPH C. SAMPSON.

Kansas

Northwest Kansas Association Organized

The Bar Association of Northwest Kansas was organized recently at Stockton. A hundred lawyers from twenty counties were present.

The Bar Association of Kansas supported the movement to organize. Justice J. S. Dawson of the Supreme Court, as executive committeeman for the 6th congressional district, convoked the meeting and presided through the organization session. B. W. Brooks, Winona, was elected temporary secretary.

An interesting debate arose over the manner of nominating officers. The majority report was for a committee on nominations; the minority report for nominations at liberty from the floor. On a division the majority report was adopted by 36 to 28 voting.

The permanent officers are: President, H. McCaslin, Osborne; Vice President, J. F. Bennett, Norton; Secretary-Treasurer, E. C. Flood. The Executive Committee includes the above and also one member from each of five judicial districts. The latter are A. W. Relihan, Smith Center; W. S. Langmade, Oberlin, 17th district; J. H. Jenson, Oakley, 23d district; W. H. Clark, Hoxie, 34th district, and S. E. Bartlett, Ellsworth, 30th district.

The General Council consists of one member from each of the counties of the 6th congressional districts. There are: Cheyenne, E. E. Kite; Decatur, W. S. Woodward; Ellis, H. F. Herrman; Ellsworth, S. E. Bartlett; Gove, R. H. Thompson; Graham, J. S. Dawson; Jewell, L. E. Weltmer; Lincoln, Mr. McFarland; Logan, C. A. Spencer; Mitchell, A. E. Jordan; Norton, W. E. Mahin; Osborne, D. G. Fink; Phillips, W. A. Barron; Rawlins, C. A. P. Falconer; Rooks, W. K. Skinner; Sheridan, F. A. Sloan; Sherman, E. E. Euwer; Trego, Herman Long; Wallace, J. E. Taylor; Thomas, E. H. Benson.

Judge W. B. Hamilton, 34th district, welcomed the convocation to his district, county and city of Stockton. Judge E. E. Kite, 17th district, encouraged the new organization. Judge J. C. Ruppenthal, 23d district, told of the growing law library, the largest in the west half of the state, developing at the State Teachers' College at Hays, and asked the Northwest Bar to help in this work.

Several counties had every lawyer present, and of those represented all but two had a majority present.

Addresses were made by C. L. Hunt, Concordia, on the Judicial Council; by C. D. Shukers, President of the State Bar, on the general value of law organization; by W. A. Smith and Roland Boyland, Attorney General and assistant. All four were elected honorary members of the Northwest Bar. A fine banquet closed the program.

Minnesota

Minnesota District Association Elects

On Saturday, May 4, 1929, at the Harvey Hotel, Faribault, Minnesota, the members of the Fifth Judicial District Bar Association held their annual meeting. About 35 members were present. President Thomas C. Daggett of the Minnesota State Bar Association was the guest of the Association and principal speaker. The new officers elected for the coming year are: President, Henry M. Gallagher, Waseca; Vice President, Francis J. Sawver, Owatonna; Secretary, Charles N. Sayles, Faribault; Treasurer, Otto Nelson, Owatonna.

CHARLES N. SAYLES, Secretary.

Mississippi

Mississippi Bar Adopts World Court Resolution

Dean Thomas C. Kimbrough of the University of Mississippi Law School, was elected President of the Mississippi Bar Association at the annual meeting held at Clarksdale on May 1 and 2. Dean Kimbrough's selection was not only a tribute to his position in the legal profession of the state but also a manifestation of the interest of the Association in legal education and in the University's Law Department. This interest has already taken tangible form in the establishment of the Mississippi Law Journal, which is published under the joint auspices of the Association and that department.

It was also decided to hold the next meeting at the University. At that time the new building, now in course of erection for the department, will be dedicated.

Hon. Sam Cook of Clarksdale was elected Vice President and Louis Jiggetts of Jackson was reelected Secretary. R. C. Stovall of Okolona, D. M. Russell of Gulfport and J. L. Williams of Indianola were chosen to serve on the executive committee.

One of the outstanding features of the meeting was the address of Hon. Josiah Marvel of Delaware, who spoke on "Our Branch of the Government." Mr. Marvel spoke of the need of the expert advice and assistance of the lawyer in solving the problems of the administration of justice and in that connection called particular attention to the importance of the rule-making power of the courts. "The bench and bar have only recently awakened to their duty and to some extent have reached the conviction that they are ready to invite the full responsibility in this behalf," said Mr. Marvel. "The first step in this direction is the formulating and the promulgating in the courts of rules governing pleading, practice and procedure; such rules devised by those who are experts will tend to simplify and expedite the administration of justice. Such action when taken is called the exercise of the rule-making power of the courts. It is now going forward in a very splendid way in Massachusetts, Connecticut, Delaware, Virginia, Colorado, Michigan, Illinois, and Washington. It is going forward by slower steps in a majority of the states. The activity of any state gives impetus to activity in another state and the proposal of clothing the courts with full rule-making power, having the force of law, has now acquired a momentum that is bound to reverse the attitude that has been taken by the legislative departments of government and the judicial department of government during the last seventy-five years."

Another interesting feature was the adoption of a resolution in favor of joining the World Court under the formula proposed by Mr. Root. The resolution reads:

"Be it resolved by this association that we believe it is the duty of this government, through the President of the United States and the Senate, to become a member of the World Court and for that purpose to accept the new protocol which embodies the formula of the Honorable Elihu Root. And we urge action to that end upon our Senators."

President George W. Currie's address sketched the activities of the association during the past year. He spoke of the continued interest of the organization in the State Law School, the work of the Grievance Committee, the appointment of a special committee on the rule-making power, and the establishment of the Mississippi Law Journal. He also reported that the Executive Committee recommended the appointment of a committee to draw up a schedule of uniform fees to be adopted by the association. It had also appeared to that committee that arrangements for a group of counties with the view of holding regional meetings would be desirable.

Judge J. C. Wilson of Memphis, invited the members on behalf of the Shelby County Bar Association to attend the meeting of the American Bar Association at Memphis Oct. 23-25, and the invitation was unanimously accepted. The following delegates were elected: R. H. Hall, Canton; G. W. Currie, Hattiesbug; G. Lytell, Hattiesburg. Alternates: W. W. Venable, J. W. Cutrer and W. H. Holmes.

The meeting concluded with a banquet at the Alcazar Hotel, at which the speakers were Mrs. Lucy Somerville Howorth, Hon. T. Weber Wilson, Hon. Josiah Marvel and Hon. J. W. Cutrer. The newly elected President, Dean Thomas C. Kimbrough, made a brief talk expressing his sense of the honor that had been accorded him and the Association's appreciation of the splendid welcome and entertainment that had been given by the local bar.

Missouri

Bar Policies Meet Public Approval

Continuance of the St. Louis Bar Association's policy of recommending candidates for judicial positions, for the guidance of voters was recommended at a meeting of the association, at which

new officers were chosen, according to the St. Louis Post-Dispatch.

Robert Burkham, newly elected President of the organization, and Jacob M. Lashly, retiring President, spoke in commendation of the plan, which was followed at the November election with notable acceptance by the voters. The full list of Bar Association selections, including three judicial nominees on the Democratic ticket and the Democratic candidate for Circuit Attorney, were elected, in the face of a considerable Republican majority on the rest of the local ticket.

Burkham, in a short talk on his induction into office, said that the responsibility of the Bar Association had increased. "Our policies have appealed to the people," he said, "and the public looks to us for guidance and advice."

Lashly said that the Bar Association should continue to deserve public confidence, and should keep itself free from any suspicion of political domination or subservience to personal interest.

The other officers chosen were: Vice Presidents, Lashly, Jesse W. Barrett and Douglas W. Robert; Secretary, James J. Seeley; Treasurer, Edward Ferrenbach; member executive committee, two-year term, former Judge A. B. Frey; members admissions committee, Arnin C. Beste, Ellison Poulton and George McNulty.

Ohio

Hamilton Regional Meeting

The Butler County Bar Association again demonstrated its ability to entertain when it acted as host to the Hamilton Regional meeting of the Ohio State Bar Association which was held at the Butler County Country Club, Saturday, May 25th, according to the Ohio Bar Association Bulletin.

The afternoon was devoted to receiving reports of chairmen of special committees and discussing arrangements for the Annual Meeting at Cedar Point, July 11, 12 and 13.

Among other matters considered by the Executive Committee was that of providing for life membership in the State Association, which subject was referred to the Committee Revising the Association Constitution, with the recommendation that life memberships be established.

The Grievance Committee was supplemented by the addition of the following new members: L. H. Frieberg of Cincinnati, Forrest F. Smith of Columbus, W. E. Slabaugh of Akron, A. V. Abernethy of Cleveland, and R. J. Burt of Canton.

The regional meeting was concluded with a banquet at the Hamilton Club, Anthony Wayne Hotel, when former Judge Walter S. Harlan welcomed the members of the state association and presented the toastmaster of the evening, P. P. Boli of Hamilton.

President John A. Elden of Cleveland spoke upon "Organization Among Lawyers." Common Pleas Judge J. H. C. Lyon of Youngstown, who is President of the Common Pleas Judges' Association of Ohio, delivered an address upon "Crime and Crime Wave," and B. F. Harwitz of Middleton delivered an after-dinner address on "Ideals of American Lawyers."

APPLICATION FOR MEMBERSHIP

To The American Bar Association,
209 S. La Salle St., Chicago, Ill. .....192...

I hereby make application for membership in the Association and certify the following:
(a. I have been a member in good standing of the Bar of the

State (or States) of.....since .....

I am a member of the following Associations of the Bar.....
(b) I am White ☐ Indian ☐ Mongolian ☐ Negro ☐

NAME.....

MAILING ADDRESS.....

CITY and STATE.....

Endorsed by.....Address.....

Check to the order of American Bar Association for $.....is attached.

If this application is made between July 1 and September 30, the check should be for $8.00; if between October 1 and December 31, for $6.00; if between January 1 and March 31, for $4.00, and if between April 1 and June 30 for $2.00.

The annual dues are $8.00. A member receives the monthly American Bar Association Journal beginning with the month of his election, and the report of the annual meeting of the Association. This report is a record of the activities of the Association and contains a list of the members.